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REPORTS

OF

CASES ARGUED AND DECIDED

IN THE

SUPREME COURT OF THE STATE OF MISSOURI,

FROM 1828 TO 1830.

Published in compliance with the Act of the General Assembly of the State of Missouri, entitled "An Act to provide for the Publication and Distribution of the Decisions of the Supreme Court of this State," Approved January 1, 1827.

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VOL. II.

SAINT LOUIS:

CHAMBERS & KNAPP, 45 MAIN STREET.

1843.

Decisions of the Supreme Court of Missouri,

JACKSON DISTRICT, DECEMBER TERM, 1827.

RAVENSCROFT *v.* GIBONEY.

Parol evidence is admissible to prove the loss and the contents of executions, together with the return thereon. (Note *a*.)

IN ERROR.

M'GIRK, C. J., delivered the opinion of the Court.

This was an action of debt brought by Ravenscroft against Giboney, before a Justice of the Peace, for certain moneys by him received to the use of Ravenscroft. The plaintiff had judgment. The cause was taken to the Circuit Court, and by a bill of exceptions taken at the trial, the following facts appear: that Ravenscroft was a Constable, and as such Constable, executed certain process, and had thereon due to him, as Constable, divers sums of money as he alledged; that afterwards, Giboney became Constable, and that executions were issued on the judgments in the cases where Ravenscroft had fees due to him. The plaintiff, to prove his case, exhibited the docket of the Justice of the Peace, which had been deposited in the Clerk's office, and then offered to prove, by the Justice and Clerk, that the executions were lost, and also the fact that the executions were returned satisfied, which evidence was refused by the Court, and the opinion of the Court excepted to, whereupon the defendant had judgment. The only question is, whether it is competent to supply a lost record in this way. In *Peake's Evidence*, 29 and 30, we find the law to be, that in some cases where it has been clearly shown, that a record once existed which had been since destroyed, evidence of its contents has been admitted. Especially in cases where the record is only inducement to an action; but in such cases the most strong and satisfactory evidence is required; and that the collateral evidence must prove the same facts that the regular evidence would have done, if in existence. The same book goes on to say,

that this species of evidence is only applicable where very ancient records are lost; for (2) if a rent roll be lost, and its contents can be ascertained, the Court will permit a new one to be engrossed. This law we deem sufficient to authorize the party in this case to prove the loss and the contents of the executions, together with the return thereon, though the record may not have been very ancient; for in this case, the Justice appears to have resigned, and puts his papers in the Clerk's office, where, by law, they should be, in such a case; and now no new execution could be made out.

The judgment is reversed and sent back for a new trial.

(a.) See Graham v. O'Fallon, 3 Mo. R., p. 507.

BETTIS v. LOGAN.

1. A copy of a record made out by an officer entrusted with the keeping of the records, will be presumed to be correct. (Note a.)
2. A transcript of the record of the Supreme Court, sent to the Circuit Court, containing an account of the proceedings of the Supreme Court, in a cause sent from such Circuit to the Supreme Court, is, when filed in the Circuit Court, a record of that Court; and a transcript of such transcript, made out and certified by the Clerk, is evidence of the facts therein contained.
3. Where the defendant withdrew his plea, &c., filed another plea to a new declaration which the plaintiff had leave to file, issue joined and trial—held to be an admission of jurisdiction in the Court where the proceedings were had.

APPEAL from St. Francois Circuit Court.

TOMPKINS, J., delivered the opinion of the Court.

This is an action on the case, brought by Logan against Bettis, for a malicious prosecution. It was commenced in the Circuit Court of Wayne county, thence the venue was changed to Cape Girardeau county, and from Cape Girardeau county to St. Francois county. In this last county, the declaration being found to be mutilated and defaced, the plaintiff had leave to file another declaration, and the defendant then withdrew his plea before that time filed, and pleaded again to the new declaration filed by the plaintiff. The parties then went to trial; a verdict was found for the plaintiff, and judgment was rendered thereon. To reverse this judgment, the defendant prosecutes his appeal. It appears by the bill of exceptions, that on the trial of this cause, the defendant read in evidence a record from the Circuit Court of Wayne (3) county, from which record it appears that Logan, at the October term of the year

1824, was indicted for stealing a book of Bettis', that on motion of Logan, the indictment was quashed; that this judgment of the Circuit Court was reversed, and that Logan was prosecuted on the indictment and acquitted.

The first assignment of errors is general. Second. That the record from the Supreme Court is irrelevant to the issue between the parties. Third. The writing produced is not the best kind of evidence, but is a copy of a copy. Fourth. The declaration alledges that Logan was acquitted on trial, when by the record produced it appears that the indictment preferred by Bettis against Logan was quashed, which does not support the declaration. The record of the indictment sent from Wayne county contains so much of the record of this Court as relates to what was done here in relation to that indictment; and the declaration in this cause alledges that Logan was acquitted on a trial on said indictment. The second and fourth errors assigned seem to be but a repetition of the same thing. They will be first noticed. It is contended by the appellant's counsel, that the record does not show that the indictment preferred by Bettis was disposed of; the indictment being quashed in the Circuit Court of Wayne county, the cause was taken to this Court, and here the judgment of the Circuit Court was reversed. The cause was then remanded with the decision and determination of this Court. The Circuit Court then proceeded to the trial of Logan on the indictment, and he was acquitted. It was contended that Logan might have been tried and acquitted on another indictment, and not on that which was quashed in the Circuit Court. To this it may be answered, that the copy of the record is made out by an officer entrusted with the keeping of the records, and to whom credit is given, and it is not to be presumed, that he would send here the record of two parts of two different indictments. The third error assigned, is, that the writing produced is not the best kind of evidence, but is a copy of a copy. The transcript of the record of this Court, sent to the Circuit Court, containing an account of the proceedings of this Court in a cause sent from such Circuit Court to this Court, is, when filed in the Circuit Court, a record of that Court, and a transcript of such transcript, if made out by the Clerk, and by him certified, is certainly entitled to as much credit as a transcript of the declarations and other pleadings filed in a cause. The objection, then, that so much of the record as is a copy of the record (4) of this Court, sent to the Circuit Court is but a copy of a copy, is thought to be unfounded. In an additional brief, furnished the Court, it is also objected that there is nothing on the record to show that the Circuit Court of Wayne county was legally divested of its jurisdiction, or that the Circuit Court of St. Francois county could legally entertain jurisdiction of this cause. Although this was not assigned for error yet it will be noticed. True it is, there is very little on the record to show how the cause found its way to the docket of St. Francois Circuit Court. The only entry is this:

James Logan, plaintiff, *v.* Elijah Bettis, defendant, in case.

Change of venue from Wayne county to Cape Girardeau, and from Cape Girardeau to this county. But afterwards, the defendant withdraws his plea, and filed another plea to a new declaration which the plaintiff had leave to file. Issue was then joined, and the parties went to trial. Here is a sufficient admission of the jurisdiction of the Court; we must presume the cause was legally docketed in that Court; if not, the defendant would have probably been ignorant of its being so docketed; or if informed, he would then have objected to the jurisdiction, had he not intended to waive his objection. His appearance in that Court, and going to trial, is a waiver

of any irregularity that may have occurred. The judgment of the Circuit Court is affirmed.

(a.) See Holliday v. Cooper, 3 Mo. R., p. 286.

BULLITT v. OVERFIELD.

Proof that a paper offered as evidence in a cause, is a true copy of the original admitted to be lost—held, to be sufficient to authorize its going to the jury.

ON AN APPEAL from the Cape Girardeau Circuit Court.

WASH, J., delivered the opinion of the Court.

This was an action of detinue brought by Overfield against Bullit, for a negro woman slave and her child. The cause was submitted to the decision of the Court below without the intervention of a jury, when judgment was given for Overfield. To reverse which Bullitt has appealed to this Court. On the trial of the cause in (5) the Circuit Court, "the plaintiff below offered in evidence a copy of a receipt which was said to be lost or mislaid. The counsel for the defendant agreed that the copy might be considered as the original and treated as such." The paper offered was in the following words, viz: "Received of Thomas W. Graves and Samuel Ravenscroft, administrators of the estate of Levi Wolverton, deceased, a negro woman and boy child, named Willis, at *thar apprased* value, as part of my *porion* as a heir to said estate, which was appraised to seven hundred dollars, received by me, Mary Wolverton. Attest, Charles Seavers (dated) January 20th, 1820."

It was then proved by Charles Seavers, the subscribing witness, that in June, 1822, "he saw Mary Wolverton sign a receipt similar to the present one, (as he understood it to be, for he did not read it,) and he subscribed his name as a witness thereto, and that he did not recollect having ever witnessed in 1820, a receipt like the one offered." The plaintiff then proved by Thomas W. Graves, that the paper offered was a copy of the receipt witnessed by said Seavers in 1822. That in January, 1820, he, Graves, took a receipt from Mary Wolverton for the negro woman and her child, which was dated at the time when he delivered the negroes; that he did not like the receipt because it did not express that Mrs. Wolverton received said negroes as a part of her interest in said estate, and therefore destroyed it and took the one of which the paper offered was a copy, bearing the same date as the original one. Other testimony was given which has no bearing upon the question on which the Court decide this cause, and need not be noticed. The defendant below objected to the reading

of the paper offered, on the ground that it was not proven to be a copy of the original receipt. Seavers proves that in 1822 he witnessed a paper of which he did not know the contents, &c. Graves proves that the paper offered is a copy of that very paper so witnessed by Seavers in 1822, and explains why it bears a different date. The evidence, whether conclusive or not, was certainly sufficient to have permitted the paper to go to the jury, had one been sitting in the cause, or to the Judge sitting as a jury. No question is raised as to the legal effect of the instrument. In the judgment of the Circuit Court we see no error; it is therefore affirmed, with costs.

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(6) SWEAZY ET AL. *v.* NETTLES.

A variance between the writ and declaration, and the verdict and judgment, in the christian name of the defendant, is fatal and avoids the judgment.

ERROR from Cape Girardeau Circuit Court.

M'GIRK, C. J., delivered the opinion of the Court.

This was an action of assault and battery against Sweazy, Ellis, Kirkland and David Sharp; the plea, writ and declaration are against David Sharp, the verdict and judgment are against Daniel Sharp; this variance is assigned for error. The Court is clear that this variance is error as to Daniel Sharp, and avoids the whole judgment. The statute of amendments has been relied on to show that this Court ought to amend the judgment. The language of the statute is, that if any verdict shall be hereafter given by any Court or jury for either party, judgment thereon shall not be stayed or reversed by reason of mistaking the christian or sur-name of the plaintiff or defendant, by the Clerk in any declaration or pleading; if on the same record the right name is once truly alledged, whereunto the party might have demurred and shown the same for cause, (see the *Revised Code*, 129).

In this case the mistake is in the verdict and judgment when it was too late to demur. The case is not within the statute relied on, and the amendment cannot be allowed. The judgment of the Circuit Court is reversed with costs, and the cause is sent back to the Circuit Court of Cape Girardeau county for a new trial.

(7) BUTLER, FOR THE USE OF HOUTS, *v.* JOHNSON.

A power of attorney from A. to B., to sue for and recover a debt due to said A. from C., and when recovered, to receive and receipt for the said judgment; one half of which was to be to the proper use of the said attorney, the other half to the use and benefit of said A; B. was styled in the power of attorney "the true and lawful attorney in fact, irrevocable of said A."—held that B. cannot claim to have it paid over to him by the Sheriff collecting under execution.

ON APPEAL from the Circuit Court of New Madrid county.

WASH, J., delivered the opinion of the Court.

This was a motion against the Sheriff, to compel him to pay over money collected on execution, the Circuit Court, looking into the whole matter, ordered the Sheriff to pay over the money to the attorneys of the plaintiff, subject to the further order of that Court; from which order the plaintiff appealed to this Court. The facts, as they are preserved by a bill of exceptions, are, that Butler gave Houts a power of attorney to sue for and recover a debt, due to said Butler, from one James Evans, and when recovered, to receive and receipt for the said judgment. One half of which was to be to the proper use of him said attorney, the other half for the use and benefit of said Butler; Houts was styled in the power of attorney "the true and lawful attorney in fact, irrevocable of said Butler." Suit was instituted in the name of said Butler, against said Evans, and shortly thereafter, a copy of the aforesaid power of attorney from Butler to Houts was placed in the hands of the Sheriff, in order to prevent him from paying over the money, when collected, to the plaintiff, Butler. After judgment was obtained, and soon after making a levy of the execution, said Evans showed to the Sheriff a release of said execution, and of the judgment on which it issued, from said Butler to said Evans; and an order in writing, that said Sheriff should return said execution satisfied; and said Butler went in person to said Sheriff, and told him he had given said release to said Evans, and directed him to restore to Evans the property he had levied on; and to return the execution satisfied, &c. The Sheriff doubting the authority of Butler to give the release and order aforesaid, retained the property he had levied on, and was afterwards ordered by Butler to sell the same, which was done accordingly. At the sale of the property (8) taken in execution, Butler purchased to the amount of $184 87 1-2, and gave the Sheriff a receipt on the execution for that sum. The balance of the judgment with the costs, was raised by the sale of other property to different persons; the costs were paid over to those entitled to receive them, and the balance of the judgment of $119 43 was ordered by the Circuit Court to be paid over to the attorneys of the plaintiff, to be by them retained until the further order of the Court. The Sheriff appealed from this order, and assigns for error, among other things, that the Circuit Court erred in ordering said Sheriff to pay over the money to the attorneys of the plaintiff.

On this point the law is with the appellant, and the judgment or order of the Circuit Court must be reversed and the cause remanded. The proper disposition of the money is a matter of more difficulty. From the whole record, we think that Houts cannot claim to have it paid over to him. His authority under the power of attorney, was to sue for and collect. He had no such title or interest as made it the Sheriff's duty to pay over the money to him, though he might perhaps have been justified in so doing. If the truth be, that the power of attorney was intended as an assignment of one half of the debt due from Evans to Butler, and was made for a good or valuable consideration, and that known to Evans, it might make a pretty strong case for the equitable interference of the Circuit Court. With that, at present, we have nothing to do. Butler (if the fact be that he executed the release, and gave directions to the Sheriff to restore the property levied on, and return the execution satisfied,) has certainly no right to call upon the Sheriff now, to pay over the money to him. Upon the whole matter, the Circuit Court is directed to permit the Sheriff to retain the money until that fact be ascertained.

Decisions of the Supreme Court of Missouri,

FAYETTE DISTRICT, APRIL TERM, 1828.

KEAN *v.* NEWELL.

Declarations made by a Sheriff, previous to the day of sale of property taken in execution, that the sale would be fraudulent on account of a mortgage which one W. held on the property, are inadmissible to defeat the title of a *bona fide* purchaser of the property at the Sheriff's sale. No declarations made by a vendor, except those made at the time of the sale, are admissible to defeat the title of an innocent purchaser.

ON APPEAL from the Boone Circuit Court.

WASH, J., delivered the opinion of the Court.

This was an action of replevin, originally commenced by Newell, the appellee, against Kean, the appellant, in the Pike Circuit Court, and removed by change of venue into the Boone Circuit Court, where Newell had judgment, which this Court reversed. The cause was remanded, and upon the second trial, Newell again had judgment, from which Kean now prosecutes his appeal in this Court. The pleas are, first, *non cepit;* second, property in one Bates; third, property in the defendant; upon which issues of fact were taken and tried. All the evidence given on the trial is preserved by bills of exception, of which a small portion only, need now be stated.

The defendant claimed the property in dispute, by virtue of a purchase from one Longmire, who purchased from one Bates, who purchased on the 4th of September, 1823, of the Sheriff of Ralls county, at a public sale of Newell's property, had by virtue of two executions, which are set out in the record.

To invalidate the defendant's title, the plaintiff attempted to show that the Sheriff's sale was fraudulent, and that Bates, Longmire and Kean, either participated in, or were cognizant of the fraud at the time of their respective purchases; and introduced

much evidence, conducing to establish the fraud. Amongst other things, certain declarations of the Sheriff made to one Vallandingham before the sale, "that the sale (10) would be fraudulent on account of a mortgage which one White held upon the property, and that he (the Sheriff) wished Vallandingham to inform his neighbors of the fact and request them not to bid, &c., which were objected to by the defendant. The plaintiff was permitted also to read in evidence, an agreement entered into between the defendant and Longmire, long after the commencement of this suit, by which the mare in dispute was put into Longmire's possession, to await the issue of the suit; and for which, if the plaintiff succeeded, Longmire was to pay Kean thirty-eight dollars, and Kean to pay half the costs. And if the defendant succeeded, Longmire was to re-deliver the mare to him," &c. To the reading of which the defendant objected.

Before the jury retired, the defendant by his counsel moved the Circuit Court to instruct the jury to disregard the declaration of the Sheriff made to Vallandingham, that the sale would be void, &c., which the Court refused to do; but instructed the jury that they might take them in connection with the other facts proven, to ascertain whether or not there was fraud in said sale; and that if the facts thus established satisfied them there was a fraudulent sale, then they must find that such fact was known to the defendant, Kean, and all persons through whom the property in dispute passed from the Sheriff, in order to find a participation on the part of the defendant Kean; and that if they found the facts proven constituted the Sheriff's sale fraudulent, and that Bates, Longmire and Kean participated in the fraud, or were cognizant of the facts thus established, at the time of their respective purchases, it was sufficient to warrant them in finding for the plaintiff. Which instructions and opinion were excepted to by the defendant. It is assigned for error, amongst other things: First. That the Court erred in permitting the Sheriff's declaration to Vallandingham to go to the jury; Second. In permitting the agreement between Longmire and Kean to be read in the evidence; and Third. In referring to the jury the question of fraud. On each of these points the law is with the defendant. It is true in the general that no declarations of the vendor, except those made at the time of sale, are good evidence to invalidate the title he has passed away. 1 *Esp. Rep.* 357. See 2 *Philip's Evi.* 215; *Hay N. C. Rep.* 397. And Sheriffs' sales, above all others, should not be defeated by such means. The agreement between Longmire and Kean was altogether irrelevant, and ought not to have been read in evidence. The jury are to (11) find the facts, but whether the facts when found constituted fraud or not, the Court must determine. It was therefore error in the Circuit Court to give the instructions above referred to. A slight circumstance appearing from irrelevant or illegal testimony, might be sufficient to raise the belief that the sale was fraudulent.

The jury must find the facts that constitute the fraud, that the Court may see and determine whether, in law, they amount to fraud.

A verdict finding a transaction fraudulent, and that the plaintiff or defendant participated in the fraud, should be set aside and disregarded, unless such specific facts were found as would enable the Court to see and pronounce upon the fraud.

The judgment of the Circuit Court is reversed with costs, and the cause remanded for further proceedings in conformity to this opinion.

M'GIRK, C. J., dissenting.

I concur with the Court in this opinion, except so far as relates to the question of fraud; and as to that matter I think the Circuit Court committed no error.

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CASEY *v.* CLARK.

1. In proceedings before a Justice of the Peace, the statute has dispensed with all matters of mere form.
2. A substantial statement or declaration of the cause of action must be filed with the Justice.

ON WRIT OF ERROR from the Cole Circuit Court.

WASH, J., delivered the opinion of the Court.

This was an action commenced before a Justice of the Peace, by Clark against Casey.

The statement of the cause of action is in these words: "John J. Clark *v.* Hardin Casey. In an action of trespass by the illegal use of one or more of his horses, in the summer of 1826, and the consequent loss of one of his horses, at the horse mill, in the town of Jefferson, or by imprudent and unauthorized usage there, to one of his beasts: say a black mare, and he claims in damages for the same to the amount of forty-eight dollars," &c. The summons of the Justice called upon Casey to ap-
(12) pear and answer Clark "in an action of trespass on the case." Casey appeared by his counsel, and objected to the sufficiency of the statement or declaration; his objections were overruled, and upon trial the plaintiff had judgment, from which the defendant, Casey, appealed to the Circuit Court, and there moved to have the judgment of the Justice reversed for the same reasons; which motion was overruled, and upon trial *de novo*, the plaintiff again had judgment; to reverse which Casey had brought his writ of error to this Court. It was doubtless a great object with the Legislature to simplify proceedings before Justices of the Peace, so that every man might be his own lawyer; to that end they have dispensed with all matters of mere form; but still a substantial statement or declaration of the cause of action, in cases like the present, are required. The one on which this action was founded, is so obviously and so variously defective in substance, that we feel no hesitation in saying the Circuit Court erred in refusing to reverse the judgment of the Justice; and that its judgment must be reversed with costs.

ODLE v. CLARK.

1. In all suits before a Justice of the Peace, a brief statement of the cause of action and the amount claimed, must be filed with the Justice.
2. The statement is necessary to give the Justice of the Peace jurisdiction, and the Circuit Court permitting such statement to be filed, after the cause came up to that Court, is error.

ERROR to the Circuit Court of Ray county.

TOMPKINS, J., delivered the opinion of the Court.

Clark, the defendant in error, summoned Odle, the plaintiff in error, to appear before a Justice of the Peace. The action was intended to be trespass. By the fifth section of the act establishing Justices' Courts, &c., it is provided "that in all suits a brief statement of the cause of action, and the amount claimed, shall be made in writing and filed with the Justice, and the same or a copy annexed to the summons; that the service thereof shall be by reading the original summons, and the complaint or statement annexed thereto, in the hearing of the defendant, or by leaving a copy of the same at his dwelling house or usual place of abode, in the presence of one or (13) more white persons of his family above the age of fifteen years," &c.

Judgment before the Justice was given for the plaintiff, and on a new trial in the Circuit Court, a judgment was given for plaintiff, defendant here; to reverse this judgment Odle prosecutes his writ of error. On inspection of the record we find that Clark filed no statement of his cause of action with the Justice, and that the Circuit Court, after the case came there, allowed him to file such statement. The want of a statement of the cause of action is, in our opinion, an incurable defect in the proceedings before the Justice.

The statement was necessary to give him jurisdiction, and without it we think the Circuit Court had no cause before it. The judgment of the Circuit Court is reversed.

ARNOLD *v.* SCOTT.

The statute of limitations, in an action of trover, for bank notes and silver coin, does not commence running until the plaintiff obtains knowledge of the conversion.

WASH, J., dissenting.

ERROR to the Circuit Court of Howard county.

TOMPKINS, J., delivered the opinion of the Court.

This was an action of trover, brought by Scott against Arnold, to recover damages for certain bank notes and silver coins of said Scott, by him charged to have been converted by Arnold to his own use. Arnold pleaded, first, not guilty; second, not guilty within five years. Scott joined issue on the first plea, and to the second replied that within ten years next before the said action was commenced, said Arnold secretly took the said bank notes and silver coins in the said declaration mentioned, out of the possession of him the said Scott; and without his knowledge or consent, secretly converted the said bank notes, &c., to his own use; and that said Arnold, for and during the space of five years next after the said taking and conversion, concealed the said taking and conversion, so that he, the said Scott, did not within that time come to the knowledge thereof; and avers that he was thereby defeated and obstructed in bringing his action, &c. To this replication the defendant demurred. (14) Judgment for the plaintiff, and to reverse this judgment the defendant prosecutes his writ of error.

By the statute, the time for bringing actions of trover is limited to five years, with a proviso that if any defendant by absconding or concealing himself, or by removal out of the State, &c., where such cause of action accrued, or by any other indirect means shall defeat or obstruct the bringing or maintaining of the action within the limited time, such defendant shall not be permitted to avail himself of the benefit of the act.

For the defendant it was contended that he could not be brought within this provision of the statute, unless it were alledged that he had done some act to obstruct the plaintiff in bringing his action, within the five years next after the cause of action had accrued; that mere silence on the subject of the taking could not be construed to be an act done, to defeat or obstruct the bringing of the action; that the law seems to require that the defendant should not be deprived of the benefit of the statute, unless he did some other act (than that by which the right of action accrued) to defeat or obstruct the plaintiff in bringing his action.

All the difficulty in this case seems to arise out of the character of the property, alledged to have been taken and converted. The bulk of money is so small, and one piece of money is so much like another, that its concealment differs very little from the privacy of a prudent and honest man in keeping such property. Between the prudent use and the concealment of more cumbrous property, there is a greater difference. Had the defendant, for example, taken a wagon of the plaintiff, and used it on his

farm or on the road, it can hardly be imagined that a jury would find it to be such a concealment as to deprive him of the benefit of the estate; but had he taken it to his house in the night time, and after taking it to pieces, packed it away in a private room, and there kept it locked up for five years, there could be little doubt that it would be such an act as would defeat and obstruct the plaintiff in bringing his action, so as to deprive the defendant of the benefit of the act. But is it reasonable, that a trespasser, who appropriates to himself the least cumbrous and most precious of all personal property, shall be in a better situation than he who takes possession of more cumbrous and less valuable property. The proof of the concealment of the one, is more easy than that of the other; but the burthen of the proof lies on the plaintiff, and no reason is apparent why a jury should not be left to ascertain the difference (15) between the concealment of money, and a reasonable privacy in using or keeping it. If the proof is more difficult than it would be in case of more bulky property, the danger of its being secreted is also greater. Policy requires that money should be guarded by the law with as much care as other property; and if there be no doubt that such a concealment of a wagon, as above mentioned, would be within the meaning of the provisions of the act, no reason occurs why the concealment of money should not equally be within its provisions. The replication, we think, is good. The judgment of the Circuit Court is affirmed.

Wash, J., dissenting.

I dissent from this opinion, on the ground that the statute begins to run, from the time the cause of action accrues; and the ignorance or knowledge of the plaintiff, as to rights, can make no difference, since the fact is not susceptible of proof, and must rest, in most cases, entirely in the breast of him who affirms his ignorance.

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Anderson v. Scott.

A levy of an attachment on property, generally, without saying whose property—held to be bad; and a garnishee summoned, without any further levy, is not bound to appear.

THIS was a proceeding by attachment, by Scott against Boggs.

M'Girk, C. J., delivered the opinion of the Court.

Anderson was summoned as garnishee; he failed to appear and answer, and judgment was entered against him; to reverse which, the cause is brought here. The

matter assigned for error is, that the attachment was not so served that the garnishee was bound to appear. I am of opinion that this error is well assigned. The act says that the manner of attaching the lands, tenements, goods, chattels, moneys, credits and effects of the defendant, shall be by the officer's going to the place where, or to the person in whose hands or possession the same may be, or to the person who is supposed to be indebted to the defendant, and then and there, in the presence of one or more creditable person or persons, declaring that he attaches the same; in this (16) case, the Sheriff returns, that he levied the same on some mules, &c., without saying on whose mules the levy was made; to make a levy on mules generally, is not a good levy; nor does it say in whose hands they were; the Sheriff then summoned the garnishee, without levying any attachment on any thing in his hands; this return and levy are clearly bad. The judgment as to the garnishee, is reversed, with costs.

COLLINS v. LEE AND PARKER.

Court of Chancery have power to set aside all judgments rendered on bonds, given for a gaming consideration. (Note *a*.)

APPEAL in Chancery from the Chariton Circuit Court.

M'GIRK, C. J., delivered the opinion of the Court.

By the record, it appears that a bond was given by Collins, the appellee, for about $100, to Parker, one of the appellants; that afterwards, the bond was assigned to Lee, the intestate of the other appellant; that Lee brought suit on said bond, against Collins, and that judgment was rendered against him; that he took a writ of error to this Court, and reversed the same. The record further shows that the cause was remanded for a new trial; was tried over again, and judgment for Lee was again rendered, for the $100 and costs; and that before the first judgment was reversed, execution issued thereon, and the plaintiff's bill alledges $63 were made thereon. Collins then brought a bill in Chancery, to be released from the balance of the judgment praying the same may be perpetually enjoined, and praying to have the $63 refunded to him by Lee's administratrix; alledging in the bill, that the bond on which the judgment was rendered, was given to secure the payment of the $100 mentioned in it, which was won of him by Parker at certain games at cards, contrary to the statute of this State. The answer of Parker admits the money was won by gambling; the answer of the administratrix admits the bond and the judgment, but does not admit

the amount of the judgment; admits the execution on the first judgment, and admits something was made on it; admits the reversal of the first judgment, &c., and says that as to the gambling, she heard the intestate say that the bond was given for money (17) won at gaming, and insists that she does not know the facts to be so, and insists that Collins shall be bound to prove it.

Upon bill and answer, the cause was set down for hearing, and the Court decreed a perpetual injunction to all except the $63, and as to that, decreed that it should be refunded by the administratrix to Collins; and as to Parker, the Court decreed that he should pay the amount of the judgment, costs, &c., to the administratrix; from which decree the administratrix and Parker appealed to this Court.

The first error alledged and insisted on, is, that a Court of Chancery has no power to grant relief, because the party should have defended himself at law; and having failed to do so, cannot now do it; secondly, the answer does not sufficiently admit the gambling consideration; and thirdly, that as to the $63 collected, the answer does not admit the amount therefor, so as to give a decree for that amount. We will examine the points in order: as to the first point, the statute regulating Chancery practice, is relied on, which says, that in all cases where adequate relief cannot be had in the ordinary course of proceeding at law, the several Courts shall have power to proceed according to the rules in equity, &c. It is contended, these words negative the power to proceed in Chancery, where the party has or might have had a remedy at law.

This appears to be true in general, but it is contended on the other hand, that though this may be true, yet the power of the Chancery Court to proceed in this case is given by the gaming act, the first section of which says, that all moneys, notes, bonds, judgments, &c., made, given, granted, &c., where the whole or any part of the consideration thereof, shall be for any money won by gaming or playing at cards, dice, or any other game, shall be void and of no effect. The second section provides that all judgments, mortgages, assurances, bonds, notes, bills, specialties, promises, covenants, agreements, or other acts, deeds, securities, or conveyances, given, granted, drawn, or executed, contrary to the provisions of this act, may be set aside and vacated by any Court of Equity, upon bill filed for that purpose by the person so granting, giving, entering into or executing the same, &c., and then says, or if a judgment, the same may be set aside on motion, &c. We hold this second section gives the power to Courts of Chancery to set judgments aside, which were rendered on bonds the consideration of which was money won at cards, notwithstanding the act re- (18) specting Chancery practice. The two acts are in *pari materia*, and to be taken as if they were but one act; and if this were the case in fact, as well as in law, then there would be no difficulty. It then appears, that that part which limits the Chancery jurisdiction to cases where adequate relief cannot be had at law, is intended to be the general rule, but that part which respects the relief in gambling cases, is intended in those instances to be, and is in fact, an enlargement of the general rule; and in this way, the two parts can stand together. It is objected on the part of the appellants, that the second section of the gaming act, only applies to cases where judgments have been confessed, otherwise, where there is a bond given, the defendant, or maker of the bond, would have three remedies? first, a defence at law when sued on the bond; secondly, a remedy in Chancery; and thirdly, a remedy by setting the judgment aside when obtained, on motion.

It is clear that a judgment obtained on a gambling consideration, may be set aside on motion. It is most probable, that when this section was framed, it was originally framed without that part which says, "or if a judgment, then the same may be set aside on motion," and that this part was added by way of amendment, without due consideration of its phraseology; but still I think it is intelligible, and that the Legislature intended by this latter provision, to provide for the setting aside judgments confessed on gambling considerations. But if this mode of setting aside judgments extends to all judgments, no great violence would be done to the intent of the Legislature; for above all things they appear to have been solicitous, that no one should receive any benefit from a gambling transaction. But whether or not a judgment confessed, or one obtained by due course of law, can be set aside, it is time enough to consider when the question arises; one thing is satisfactorily certain, that all judgments however obtained, may be attacked and vacated in Chancery, by the very terms of the statute. This may be done, and nothing would be doubtful about the matter, if it were not for the latter clause of this second section; upon the whole matter, this point is ruled for the appellee.

The next point is, does the answer admit sufficiently that the bond was given for a gambling consideration? I think it does. It is true the answer says the administratrix does not know the fact, and insists it shall be proved. This, I conceive, is proved sufficiently, notwithstanding the demand for farther proof; for the an-
(19) swer admits the intestate did say that the bond was so obtained; the administratrix does not alledge that she believes the fact to be otherwise, or that she expects or hopes to prove otherwise; but simply says she does not know, and demands that it shall be proved. This point is also ruled for the appellee. The next matter of error, is, that the Court ordered the $63 to be repaid. This point is ruled for the appellant, because the answer no where admits that was the amount.

The Court could not, therefore, assume $63 to be the amount; nor could they, on this evidence, decree for any sum. This point is ruled for the appellants. The decree as to the $63 is reversed; as to that part which decrees a perpetual injunction, it is affirmed, and the appelle pay the costs of this appeal. The cause is remanded for further proceedings.

Tompkins, J., dissenting.

I do not think the answer sufficiently admits the bond to have been given for a gambling consideration; in every other matter, I agree with the other Judges.

(a.) See contra, Wilkerson v. Whitney, 7 Mo. R., 295.

Decisions of the Supreme Court of Missouri,

ST. LOUIS DISTRICT, MAY TERM, 1828.

La Grange, *alias* Isidore, *v.* Chouteau.

1. The ordinance of 1787, was intended as a fundamental law, for those who may choose to live under it, rather than as a penal statute.
2. In construing the ordinance, the Court will not be tied down to the particular exceptions contained therein, but will look at its spirit and object.
3. Any sort of residence contrived or permitted, by the legal owner of the slave, upon the faith of secret trusts or contracts, in order to defeat or evade the ordinance, and thereby introduce slavery de facto, would entitle such slave to freedom.
4. A citizen of Illinois, and resident there, may own and employ slaves in this State; and the occasional visits of the slave to that State, do not constitute such a *residence* as entitles the slave to freedom.

APPEAL from St. Louis Circuit Court.

Wash, J., delivered the opinion of the Court.

This was an action of trespass *vi et armis*, under the statute, to try the right of said Francois to freedom. Chouteau had judgment in the Circuit Court, from which Francois has appealed to this Court. The material facts (as preserved by a bill of exceptions,) are stated by the appellant's counsel. That in the year 1816, one Pascal Cerre, being the owner of said appellant, (who it is admitted was not then entitled to his freedom,) was desirous of selling said slave, and the said Pierre Chouteau, jr., the appellee, wished to purchase him. That Cerre declined selling the slave to Chouteau, because he, Cerre, wished to sell him to some person who would remove him from St. Louis.

That one Pierre Menard, a citizen of Illinois, and then residing at Kaskaskia, proposed purchasing the appellant, and accordingly Cerre sold him to said Menard for the sum of $500, which was paid by said Menard. That said Menard, immediately after said sale, took said appellant to Ste. Genevieve, and from thence sent him to (21) work at Mine a la Motte, in Washington county, in this State. That some time afterwards, the appellant was sent to Kaskaskia, where he was put on board a keel boat, and after remaining about two days, went in said boat as a working hand to New Orleans. That about the last of March, 1817, the said appellant returned in the same boat to Kaskaskia, where he remained a few days, (one witness stated eight or nine,) assisting to unload said boat. Then was sent in said boat to the big swamp in Cape Girardeau county; and after remaining there five or six weeks, returned in the boat to Kaskaskia, and after two or three days, he was sent to St. Louis and delivered to the defendant, where he has remained ever since—and that said Chouteau, since said delivery, in consideration thereof, has paid the sum of $500 to said Menard.

It further appears from the testimony of said Menard, preserved in the bill of exceptions, that he, Menard, never bought the appellant with the intention of keeping him, or making Kaskaskia his place of residence; but that the slave had been purchased by him for Chouteau, to whom he was to be delivered after a few months; the object being to get around Cerre's objections to selling him in St. Louis. At the trial in the Circuit Court, the counsel for the appellant moved the Court to instruct the jury—

First. That if the jury shall be of opinion that the plaintiff remained in the State of Illinois with the person who purchased him, and who was a resident of said State, they must find for the plaintiff

Second. That the right of the plaintiff to his freedom is not affected by any secret trust or understanding between the person who purchased and brought him to Illinois, and any other person whatsoever.

Third. That if the jury shall be of opinion, that the plaintiff was during any time lawfully a resident of the State of Illinois, and in the service of a citizen of that State, claiming property in, and owner of said plaintiff, they shall find a verdict for the plaintiff.

Fourth. That if the jury shall be of opinion that the plaintiff was sold absolutely by a citizen of the State of Missouri to a citizen of the State of Illinois, and belonged under such sale to said purchaser, no secret understanding between said purchaser and a third person shall affect the rights which the plaintiff may otherwise have to his liberty, as a consequence of his residence in the State of Illinois.

The Court refused to give the first, second and fourth instructions—gave the third (22) as asked, and in lieu of the fourth, instructed the jury, that if they believed the plaintiff was bought by Col. Menard, for his own use, and taken to Illinois and kept there with the intention to make that the slave's permanent place of residence, they ought to find for the plaintiff. The refusal of the Court to give the instructions asked for, is assigned for error; and the cases af Merry *v.* Menard & Tiffin, and Winny *v.* Pettibone, decided by this Court, have been relied on as giving a construction to the ordinance of 1787, in favor of the plaintiff's claim on the ground of *residence.*—Without adverting to the precise terms of those decisions, it may suffice to state, that they cannot be made to push the principle so far. Any sort of residence contrived or permitted by the legal owner, upon the faith of secret trusts or contracts, in

order to defeat or evade the ordinance, and thereby introduce slavery de facto, would doubtless entitle a slave to freedom, and should be punished by a forfeiture of title to the property. In this case, it is most apparent that the object of Menard and Chouteau, was to get round the objections of Cerre, and not to evade or violate the ordinance. This Court has decided, that it will not be tied down to the particular exceptions contained in the ordinance, but will look at its spirit and object, and a case cannot be well conceived that could fall more fully without the spirit of its provisions. The owner of a slave removing to Illinois, and carrying his slave along with him to reside there permanently, must intend to introduce "involuntary servitude or slavery," against the express terms of the ordinance; but the owner of a slave who is merely passing through the country with him, or who may be resident in Illinois and may choose to employ him in Missouri in mining, or as a sailor, or boat hand, upon the river or high seas, in boats or vessels that occasionally lade and unlade their cargoes at some port or place within the State, though he may not do much in "extending the fundamental principles of civil and religious liberty" certainly, does nothing towards engrafting slavery upon the social system of the State. It may be seen at once, to what injury and inconvenience a contrary doctrine would lead. The ordinance was intended as a fundamental law, for those who may choose to live under it, rather than as a penal statute to be construed by the letter against those who may choose to pass their slaves through the country. Under this view of the case, it is immaterial whether Menard was the owner or bailee of the slave. It is very certain that no secret trust or understanding with Chouteau, touching the title of the slave, could have prevented the operation of the ordinance, if the (23) residence had otherwise been sufficient to entitle the plaintiff to freedom; but it is equally certain that no such residence is proven.

The first instruction prayed for, was altogether too general, and was rightly refused. The second and fourth might have been given or refused without prejudice to either party. The position assumed by the appellant's counsel was correct in the abstract, but not arising in the cause, the Court did right to refuse the instruction. The third instruction, which was given, placed the question of residence on its true ground. The residence of the owner may be looked to, not as fixing the residence of the slave, but as one circumstance along with others from which the jury may infer the intention to evade the ordinance.

Upon the whole matter the judgment of the Circuit Court is affirmed.

THE STATE *v.* GARDNER.

1. An indictment against a Justice of the Peace for a *wilful* misdemeanor in office should show such facts as would amount to such misdemeanor, independent of the word *wilful;* and to make this out, the indictment should charge the act to have been done, knowingly and corruptly.
2. The instrument should alledge the *fact* to be wilful; not that the defendant wilfully did an illegal act; which was held bad on demurrer.

ERROR from St. Louis Circuit Court.

M'GIRK, C. J., delivered the opinion of the Court.

This was an indictment of a Justice of the Peace for a supposed misdemeanor in office; the indictment was demurred to, and the demurrer sustained: to reverse this judgment, the State brings the cause to this Court by writ of error.

The first section of the act of 4th January, 1825, *Revised Code*, 469, provides for the appointment of Justices of the Peace, and the act in part defines their duties—the 5th section of which provides "that the said Justices of the Peace shall continue in office during the term of four years from the date of their commissions, unless sooner removed therefrom on conviction for bribery, perjury, or other infamous crime, or on conviction for any *wilful* misdemeanor in office, by indictment in the Circuit Court,

(24) The indictment charges that Gardner was a Justice of the Peace, and that as such Justice of the Peace, did, on a certain day, wilfully issue his summons directed and delivered to the Constable of St. Ferdinand township, commanding the said Constable to summon one John Spencer to appear before him, the said Gardner, on a certain day, to answer to a pretended demand in favor of one black Locker, a negro man slave, which summons was served—the said Gardner at the time of issuing said summons, knowing that Locker was a slave and the property of him, the said Gardner, to the great perversion of public justice, and contrary to the form of the statute, in such case made and provided, &c.

The point made in this case is, whether the indictment charges any misdemeanor. The words of the law are: on conviction for any wilful misdemeanor. The words of the indictment are: that the defendant wilfully issued a summons, &c. And the Circuit Attorney insists that it being clearly a void summons is a misdemeanor; and it having been alledged to be wilful, the statute is satisfied and the indictment good. I am of a contrary opinion. In this case two things are required. First. That the indictment should show such facts as would amount to a misdemeanor independent of the word *wilful*, and to make this out the indictment should charge the act to have been done knowingly and corruptly; and secondly, that the fact should be alledged to be wilful. It may be that the Legislature intended to use this word to draw a distinction between intentional and corrupt violations of official duty, and those that are only instances of gross ignorance or negligence. If the word will not bear this meaning, I know of none else it can have; for without this word the law

would define every misdemeanor to be wilful, except in a case where a particular act is declared by express enactment to be such.

The judgment of the Circuit Court is affirmed with costs.

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(25) HEMPSTEAD v. DAREY.

A notice on the day of the trial of a cause, before a Justice of the Peace, by one of the parties in the trial, that he intended at a subsequent day to take an appeal—held, not to be a sufficient notice of such appeal. (Note *a*.)

ERROR to St. Louis Circuit Court.

TOMPKINS, J., delivered the opinion of the Court.

Darby sued Hempstead before a Justice of the Peace, and had a judgment. On the day of trial Hempstead gave notice of an appeal. The day of trial was on the 19th day of January, 1828, and on the 26th day of the same month he asked an appeal, which was granted and bond given on the same day.

The Circuit Court dismissed the cause from the docket for want of notice. The act of 21st of February, 1825, provides that in all cases of an appeal, not prayed for on the day of trial, the party appealing shall notify, in writing, the opposite party or his agent, &c. The defendant could not properly call himself the party appealing until his appeal was prayed for and perhaps granted. The notice then given on the day of trial before the Justice, of an intention to take an appeal seven days after the trial, does not seem to satisfy the law. Had he taken his appeal on the day of trial there would have been no need of notice; but as it was not taken on that day, it ought to have been given in writing. This Court will not, where a legal notice has not been given, presume such notice from the fact of the party, to whom the notice ought to have been given, coming into Court and moving to dismiss the cause for want of notice. Had Darby proceeded in his cause by pleading to the merits, or by doing any other act to admit notice, the case would have been different. The judgment of the Circuit Court is affirmed.

(*a*.) See Cave & Morris v. Hall, adm'r, 5 Mo. R., 61.

(26) VALLAD v. THE SHERIFF OF ST. LOUIS COUNTY.

Warrants issued by the Governor for the apprehension of fugitives from justice, are required to be under the Great Seal of the State; and the impression of the seal being unintelligible, makes void the warrant.

M'GIRK, C. J., delivered the opinion of the Court.

Paul Vallad presented his petition to the Court for a writ of *habeas corpus*, alledging that he was illegally imprisoned, under a pretended warrant issued by the Governor of the State, on a demand made by the Executive of Illinois, charging the prisoner to be a fugitive from justice.

The writ was granted, the Sheriff returned the cause with the warrant. It was objected the warrant was void for want of being under the Great Seal of the State. The act of the General Assembly in such cases, made and provided, requires the warrant to be under the Great Seal of the State. The armorial bearing, the emblems and devices of the Great Seal are declared by statute. By an inspection of the statute, and the impression on the alledged warrant, we can scarcely perceive any one distinct requisite of the Great Seal on the impression, and because the impression is wholly unintelligible, we think the warrant void. The prisoner is discharged.

WASH, J., dissenting.

The question, as has been stated, was one of inspection purely. The impression of the seal was certainly very faint, but to my eye enough appeared to satisfy my mind that it was the Great Seal of the State, and that the devices, words, and letters appearing thereon, could not be a counterfeit, or pertain to any thing else than the Great Seal.

TOWN v. THE CLERK OF THE SUPREME COURT.

Writs of error do not lie from the Supreme to the County Courts.

MOTION for a writ of error to the County Court.

M'GIRK, C. J., delivered the opinion of the Court.

The case appears to be that the counsel for Mr. Town filed his præcipe with the Clerk, requiring him to issue a writ of error to the County Court of St. Louis county, to bring up a certain matter there decided and adjudged, wherein by law an (27) appeal does not lie to the Circuit Court. The Clerk refused to issue the writ, and an application is made to this Court to compel the Clerk to issue the writ. It is contended by Town's counsel that he is entitled to the writ by the third section of the fifth article of the Constitution of the State, which says the Supreme Court shall have a general superintending control over all inferior Courts of Law; shall have power to issue writs of *habeas corpus*, mandamus, &c.; that by this provision the writ should issue, notwithstanding the Legislature have not, by any enactment, provided for this case; and notwithstanding the provision in the eighth section of the same article, which says, "the Circuit Court shall exercise a superintending control over all such inferior tribunals as the General Assembly may establish." It is contended that this superintending control of the Supreme and Circuit Courts is concurrent, and that the Supreme Court shall exercise this power.

It is contended on the part of the Clerk, that the single argument of inconvenience is a sufficient answer to this construction, for if it were as Town's counsel contends, then the consequence might be that at the same time the two Courts might have the same matter before them, and this would produce great inconvenience. It is also insisted by the Clerk's counsel, that when we take into view the words of the second section of the fifth article, which says the Supreme Court shall have appellate jurisdiction only, except in cases otherwise provided for by this Constitution, in connection with the two former clauses, the matter must be clear for the Clerk. The argument of inconvenience must, in doubtful cases, have a great weight; it is agreed, and we think with great propriety, that the superintending control of the Supreme Court, given by the Constitution, is completely satisfied by the Legislature, when they limit that to appeals and writs of error from the Circuit Courts to this Court, leaving the writs of habeas corpus, mandamus, quo warranto, certiorari, and other original remedial writs given in the Constitution to the Supreme Court, untouched.

It is true that the Legislature have not, in terms, given a writ of error from the Circuit Court to the County Court, but the act of the General Assembly of 9th Jan. 1825, (see *Revised Code*, 274,) says that the several Courts shall respectively have power to issue all writs which may be necessary in their respective jurisdictions, according to the principles and usages of law. It seems this provision is sufficient to enable the Circuit Court to issue a writ of error, or a writ by any other name, to bring up any (28) matter or thing, had or done in the County Court touching the right of parties litigant therein; and more especially so in cases where no appeal is given. So that

nothing in this case can be adduced from the argument of the plaintiff's counsel, that unless his construction prevails, there will be a right without a remedy. Upon the whole matter, the motion is overruled with costs.

PAPIN *v.* RUELLE.

An action of trespass will lie before a Justice of the Peace, for trespass committed on lands; but the plaintiff in such action can recover single damages only. Treble damages are recoverable only in an action of debt.

ERROR from St. Louis Circuit Court.

WASH, J., delivered the opinion of the Court.

The plaintiff, Papin, sued Ruelle in an action of trespass before a Justice of the Peace, for cutting down, taking and carrying away certain trees from off the plaintiff's land, &c. The plaintiff had judgment for *one* dollar, and the Justice gave judgment for *three*, under the statute allowing treble damages. Ruelle appealed to the Circuit Court, where the judgment of the Justice was reversed, and the appeal dismissed, on the ground that Papin had misconceived his action. Of this there can be no doubt. The statement, or declaration and summons, both show it; treble damages are recoverable only in an action of debt. The plaintiff's statement, however, is in form and substance a good declaration, in trespass generally, under the statute, *Rev. Code*, p. 473, sec. 1; and upon it the plaintiff might have recovered for the actual damage sustained. The case of Papin *v.* Montague, decided at the last term of this Court, is not distinguished in principle from the present. The Circuit Court erred in dismissing the appeal; its judgment is, therefore reversed, and the cause remanded for a new trial conformably to this opinion.

(29) WATSON v. MUSICK.

1. In an action on the case for words spoken, they should be laid in the declaration as they were uttered.
2. The evidence must prove such of the words as will suffice to sustain the declaration—it will not do to prove equivalent expressions.
3. When there is any alternative evidence before the jury, the Court should instruct the jury hypothetically.

ERROR to St. Louis Circuit Court.

TOMPKINS, J., delivered the opinion of the Court.

This is an action on the case brought by Watson, the plaintiff in error, against the defendant in error, Musick, for words spoken. The declaration contains two counts—the words charged to have been spoken in the first are: "You," meaning said Watson, "are a hog stealer, you stole two hogs from Murphy, the way you make out your living is by using other men's property." The words alledged to have been spoken in the second are: "He," meaning the said Watson, "is a hog stealer, he stole two hogs from Murphy; the way he makes his living is by using other men's property." The plea was not guilty; verdict and judgment for the defendant. To reverse this judgment, plaintiff prosecutes his writ of error.

On the trial it was proved that the defendant spoke of the plaintiff these words: "Now any body may steal hogs as he would not have to pay for them;" and then addressing himself to the plaintiff, spoke these words: "Murphy said you stole two of his hogs, and I can prove he said it." On the cross examination of Andrew Link, a witness, he said he was not sure whether the words used by the defendant were, "You stole two hogs from Murphy," or, "Murphy told me you stole two of his hogs, and I can prove he said so." It was proved by other witnesses that the defendant spoke these words to the plaintiff: "Murphy told me that you stole two of his hogs, and I can prove that he said so." The testimony of Link, as well as that of the other witnesses, refers to words spoken by the defendant immediately after a trial of a cause before a Justice of the Peace, mentioned by them; and all the witnesses probably refer to the same conversation. It was also proved that, at the time above referred to, the defendant said to the plaintiff, in the presence of the same witnesses, "I don't live upon other men's property." The plaintiff also proved that previous to the same time, the defendant had told James Walton that the plaintiff, Watson, had taken his (the defendant's) hogs, and that he would make him pay for (30) it; no other material evidence was offered.

The Court, at the request of the defendant, instructed the jury:

First. If they find from the evidence, that the words spoken by the defendant were "now any body might steal hogs, as he would not have to pay for them," or words of the same import, they do not support the declaration.

Second. If the words spoken by the defendant were, "the Murphys said you stole hogs, and I can prove they said so, and more than that, I don't live upon other men's property," or words of the same import—the declaration is not supported.

Third. If the jury find from the evidence, that defendant did but re-publish a slander invented by another, and at the same time such re-publication was accompanied by the author's name, such re-publication does not support the declaration. The Court gave the instruction as required.

The plaintiff then asked these instructions:

First. If the jury shall be of the opinion, that by the words "now any body might steal hogs, as he would not have to pay for them," the defendant intended to say the plaintiff had stolen a hog or hogs, they shall find for the plaintiff.

Second. That if by the words "I don't live on other men's property," the jury shall be of opinion, the defendant intended to say that the plaintiff lived on other men's property, they shall find for the plaintiff.

Third. That if the jury shall be of opinion, from the whole of the evidence, that said defendant charged the plaintiff with stealing the hogs of Murphy, they shall find for the plaintiff.

Fourth. That if they shall be of opinion, from the whole of the evidence, that said defendant charged said plaintiff with having taken the hog of the defendant, by stealing the same, they shall find for the plaintiff.

The Court refused to give the instructions asked by the plaintiff. The slanderous words should be stated as they were uttered, 1 *Chitty*, 384; for this, there is the most obvious reason, viz: to inform the defendant against what charge he must defend himself. It is not, certainly, expected, that every word is to be proved exactly as laid in the declaration, but he must prove such of them as will suffice to sustain his declaration, and it will not suffice to prove equivalent expressions; see same author, same page, and the authorities cited. Had the words, proved by the plaintiff to have been spoken by the defendant, been charged in the declaration to have been spoken (31) by the defendant, it is probable that by an apt reference to the subject on which the defendant was conversing, the proof of slander might have been made out by the testimony here produced: but it seems very clear that the words, "now any body might steal hogs, as he would not have to pay for them," ought not to be admitted to sustain a declaration charging the defendant with saying to the plaintiff "you are a hog stealer, you stole hogs from Murphy," &c. It is the opinion of the Court, that all the instructions asked by the defendant, were properly given. The plaintiff cannot sustain his declaration by proving that the defendant re-published a charge made against the plaintiff by another person. The third instruction asked for by the plaintiff is, "that if the jury shall be of opinion, from the whole of the evidence, that said defendant charged the plaintiff with stealing the hogs of Murphy, they shall find for the plaintiff." Link, a witness introduced by the plaintiff, on cross-examination, said he was not certain whether the words used by the defendant were "you stole two hogs of Murphy," or "Murphy told me you stole two of his hogs, and I can prove he said so;" although the other witnesses, referring, probably, to the same conversation, proved the latter words to have been spoken, and thereby seemed to exclude the probability of the former, to-wit: "you stole two of Murphy's hogs," having been used by the defendant, yet still the Court ought to have left the jury at liberty to find these words to have been the words spoken by the defendant, they would have supported the first count, if the jury could have believed them to be the language of the defendant. This instruction was of so general a character, that the Circuit Court probably lost sight of the alternative statement of the evidence by

Link. This instruction should, in the opinion of the Court, have been given. The other instructions asked by the plaintiff, were properly refused.

The judgment of the Circuit Court is reversed, and the cause remanded for further proceedings.

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(32) STOKES v. O'FALLON, EXECUTOR, AND STOKES.

1. A testator dying, and leaving a widow, of whom no mention is made in the will—held, as to the widow to have died intestate.
2. The widows of alien residents, who die in this State, are entitled to dower.
3. The debts of the deceased must be first paid, before the allotment of dower.
4. The personal estate of the deceased, is the primary fund for the payment of his debts.

APPEAL from St. Louis Circuit Court.

M'GIRK, C. J., delivered the opinion of the Court.

This was a bill in Chancery for dower, for a discovery, and for marshalling assets, &c.

The record shows, that the complainant was the lawful wife of William Stokes, who was an alien. That in 1818, Stokes took the preparatory steps towards naturalization. That in 1823, Stokes died, possessed of considerable real and personal estate. That before his death, he made his last will and testament, devising and bequeathing his whole estate, real and personal, to O'Fallon in trust, for the benefit of Ann Stokes, his illegitimate daughter. That Stokes left no lawful issue. That the personal estate is absorbed in the payment of debts, and the principal part of the real estate also. It also appears that the complainant, at the time of Stokes' death, was an alien.

The complainant claims, first, to be endowed of one half of the personal estate of which the testator was owner at the time of his death—before payment of debts; and that inasmuch as this fund has been used up in the payment of debts, that the remaining lands may be charged with that half, and sold or applied to raise an equivalent, to the use of the widow absolutely.

The answer admits the chief things charged in the bill, and denies the right of the complainant to have any share of the personal property, in exclusion to the payment of debts out of that fund; and insists that an alien wife is not entitled to be endowed. The Circuit Court, on this state of things, dismissed the complainant's bill, with costs.

The error assigned, embraces the whole matter on the record. I will first consider the question:—whether, by the laws of this State, as they stood at the time of Stokes' death, in September, 1823, an alien widow could be endowed? And then I will consider the question:—whether a widow's share of the personality, where the estate is solvent, is to be deducted from the whole assets as they stood at the time of the death (33) of an intestate? or whether that share shall be deducted from the remaining assets after the payment of debts?

In this case, before I proceed to the main question, I will notice the fact, that in the will, Stokes is silent as to the widow, which silence by the act of the Legislature of 1st December, 1821, concerning wills and testaments, according to my reading of the 4th section of that act, declares, that when any person shall make a will, and die, leaving a widow, &c., making no mention, in the will, of the widow; that as to her, he shall be deemed to die intestate. So that so far as respects this widow's right to be endowed, I will consider it as a case of intestacy.

I will consider the question whether an alien widow can be endowed. By the act of 6th December, 1820, aliens residing in any part of the U. S. or Territories, who shall have made a declaration of their intention of becoming citizens of the U. S., by taking the necessary oath in due form of law, are declared capable of acquiring and holding real estate in the same manner, and to the same extent, that citizens of the U. S., can do. This act establishes the capacity of the complainant's husband to hold a thing out of which a citizen's widow would be endowed.

I think it is clear from a review of the several acts of the Legislature, passed at different periods of time, that the Legislature never intended to exclude alien widows from dower; it is true, that by the common law, an alien could not be endowed, and the reason given for it, is, because an alien could not hold land. The act passed 19th January, 1816, says, the common law of England, which is of a general nature, and not contrary to the laws of this Territory, shall be the rule of decision—so that there can be no doubt that at common law, the alien widow could not be endowed, unless that part of it which prohibits it was contrary to the then laws of Missouri.

The most recent act in force, on the subject of descents of real estate, at the time of Stokes' death, is, the act to direct descents and distributions, passed 11th January, 1822, which says, that henceforth, when any person, having title to real estate, shall die intestate, his estate shall descend and be distributed, after the payment of debts, in a certain manner, deducting the widow's right of dower, if there be one. This saving, in the act, does no more than save the widow's dower from descending to the heir, which it otherwise would have done, but the saving is a general one, and it (34) seems to me, if the Legislature did not intend all widows to have dower, whether aliens or not, this was a most proper occasion for them to have said so; for, in this case, the whole subject of descents was before them. The expressions, "deducting the widow's right of dower, if there be one," without taking notice of the fact, that there will often, in such cases, be alien widows, is strong evidence they did not intend to exclude them. The next act to be noticed, is that of 25th Jan., 1817, which says, that the estates of persons dying intestate, shall descend and be distributed in the following manner, to wit:—If the intestate shall leave a widow and a child or children, the dower of such widow shall be one-third, &c., and then in the same section, the act says, and any person dying intestate, leaving a widow and no lawful issue, the widow shall be entitled, as her dower, to one equal half of the estate of which her husband died seized, after his just debts are paid, the personal pro-

perty absolutely, and half the lands and slaves, for her life; upon this act, it is conceived, the widow's right to dower mainly depends; and this is the law the Legislature had their eye on, in the act of descents, of 1822, wherein they save the widow's dower from the operation of that act by an express saving.

Upon this view of the several laws, I will remark, that when this act, 1817, was passed, the law makers must have known that the common law was adopted, and that by it, all widows could not be endowed: yet they use general words, clearly including all widows, as well aliens as others. This general act is subsequent to the introduction of the common law, and is broad enough to suppress the common law rule. If alien widows are to be excluded from the benefit of the general words so as to be excluded from dower, under the common law rule, it should only take place to answer some great end of State or national policy. I think neither reason nor State policy requires these general words to be narrowed. The state policy of England in refusing aliens to hold land, never did exist in the United States, nor did it ever exist here; at the very time this act of 1817 passed, it could not have been a fact unknown to the Legislature, that there were in the country many alien wives; and I cannot suppose they had any narrowness of feeling on the subject. Furthermore, before the act of 1817, the act of 1815 contained, with respect to dower, about the same expressions; so that I think I may safely say, before the common law rule came here, aliens might have dower, and if this be true, then it must be clear that the statute (35) law was not impaired by the introduction of the common law. For the introducing act introduces no new rules of common law, contrary to the laws of the country. At the time this dower was cast, aliens might hold lands by the express terms of the statute of 1822; this woman, however, does not come within the terms of the statute; but this act goes far to prove, that whenever the reason of the law ceases, the law ceases also. The Legislature seeing, perhaps, that there existed no political reason here to prevent aliens resident from holding land, have thought it the best way to do away all doubts.

The reason in England forbidding foreigners to hold land, was a rule founded on the jealousy the King had against being over-run by strangers; but in this State, the policy is to invite them, by every mode likely to be effective. This point being for the complainant, I will consider the next point, which is: shall the widow be endowed of one half the personality before the debts are paid, or shall she only have the half of the personal assets remaining after the debts are paid? This point is ruled for the defendant by the 4th section of the act, directing the probate of wills, &c., passed January, 1815; it is declared, that all debts owing by any person, at the time of his decease, shall be paid by his or her executor or administrator, reserving first to widows, in all cases under this act, their right of dower. The 9th section of the same act says: the remaining part of any land, slaves, and personal estate, after the widow's right of dower, as hereinbefore provided, and after the payment of all just debts, shall descend and be divided, &c. If this law had been in force at the time of Stokes' death, the complainant would prevail,—but, about two years after, the Legislature again took up the subject, and occupied the same identical ground with a new and contrary enactment. See the act of 25th January, 1817, entitled, an act supplementary to, and amendatory of the several acts, directing the probate of wills, &c.; the first section of which, provides that the estate of persons dying intestate, shall descend and be distributed in the manner following, to wit: If there shall be a widow and child or children, the dower of such widow shall be one-third part of

said estate, after all just debts are paid, and in the same section, in speaking of a widow where there is no children, the same language is used: after the debts are paid, the widow shall be endowed. This view of the subject satisfies me that the debts must first be paid. I am also clear, that the personality is, or was, at that time (36) the primary fund for the payment of debts, and that the real estate cannot, in a case like this, be charged to raise a fund to the use of the widow. The decree is reversed, and remanded for further proceeding.

MILLY, (a woman of color,) *v.* SMITH.

1. Slaves carried into Illinois, with a view to residence, and staying there long enough to acquire the character of residents, do, by virtue of such residence, become free.
2. Such a residence, as would entitle the slave to freedom, cannot be acquired without the connivance or consent of the legal owner.
3. Instruments of writing offered in evidence, which were executed in other States, and upon which depend the rights of parties litigant here, will, in the absence of the foreign law, be construed according to the laws of this State.

APPEAL from St. Louis Circuit Court.

TOMPKINS, J., delivered the opinion of the Court.

This was an action of trespass, &c., under the statute brought by Milly the appellant, against Smith the appellee, to establish a right to freedom. The appellee pleaded the general issue. Judgment was entered for the appellee, from which the appellant appeals to this Court. The facts proved at this trial are, that David Shipman, a resident of Kentucky, owned and was in possession of the appellant as a slave; that on the 17th October, 1826, while residing in Kentucky, he executed a deed to said Smith, of which a copy is here given, viz: "This indenture made this 17th day of October, 1826, between David Shipman of the one part, and Stephen Smith of the other part, witnesseth: that the said David Shipman, for and in consideration of the sum of one dollar to him in hand paid, the receipt of which he doth hereby acknowledge, hath granted, bargained and sold, and by these presents doth convey unto the said Stephen Smith, and his heirs forever, a tract of land in Shelby county, on Guess' Creek, containing 26 acres, upon which said Shipman's grist and saw mill now stands; also, a negro man named Moses, about 30 years of age; one woman named Milly, about 25 or 6 years old; one child called David, about 18 months old; Harry about 16 years; Bill about 12 or 13 years old; Sarah about 27 years old;

Eliza about 15 years old; six head of horses; one yoke of oxen and cart; ten head (37) of cattle; 30 head of sheep; 30 head of hogs; beds and furniture; house-hold and kitchen furniture of every description; farming utensils, and one clock: To have and to hold the said land, slaves and chattels, with their future increase, to him the said Stephen Smith, and his heirs, forever—and the said David Shipman covenants that he will warrant the title thereof to the said Smith, and his heirs, against the claim of all persons whatsoever, rendered, however, subject to the following conditions, that is say: that whereas the above named David Shipman is indebted to the Commonwealth's Bank in about the sum of eight hundred dollars, for which the said Stephen Smith is bound as security, and the said Shipman is also indebted to the heirs of William Cooper, in about the sum of six hundred dollars, for which said Stephen is bound as security in a replevin bond, also indebted to Elijah Warner in about the sum of one hundred and twenty dollars, an execution in the name of Helm for about one hundred and forty dollars, for which sums said Stephen is also bound as security; and is also indebted to said Stephen in his own right in about the sum of $207 due by note. Now the lands, chattels and slaves aforesaid, with their future increase, are hereby declared to be given in mortgage to secure, save, indemnify and pay the said Stephen Smith, as security, and in his own right in the several sums of money hereinbefore enumerated and mentioned; and it is hereby expressly understood and agreed between the parties, that the said David Shipman may, and is hereby permitted to retain and keep possession of the said land, slaves and other chattels with their future increase, and to have the use thereof, subject, however, to the lien hereby created; and should said Shipman, or the said Smith, at any time hereafter be able to effect a sale of the land, slaves, &c., or any part at their fair value, and apply the proceeds thereof to the payment of the liabilities and claims herein enumerated, or to the discharge of a judgment in favor of the Farmers' and Mechanics' Bank, of Shelbyville, against said Shipman, that in such case said Shipman and Smith will consent to said sale, and make title to the property so sold, in which title said Smith will release the lien hereby created. Witness, &c."

The deed is signed by both parties. This instrument of writing was recorded in Shelby county, Ky. That soon after the execution of said mortgage, said Shipman being greatly embarrassed, took the said Milly with several other of his slaves, and secretly ran away with them to Indiana: that in Jefferson county, in the State of In-
(38) diana, he executed a deed of emancipation to said slaves, of whom said Milly then present was one, and acknowledged the same before a Justice of the Peace of said State. This deed bears date 3d October, 1826, but was acknowledged on 30th of same month; that immediately afterwards, said Shipman carried said Milly to Peoria county, in the State of Illinois, where he said Shipman settled, hired a farm, stocked the same and declared that he intended to reside there permanently, and has ever since resided there and kept Milly there; that said Milly resided there with him from October or November, 1826, till some time in May, 1827, at which time the defendant came thither and took said Milly secretly away against her consent, and the consent of said Shipman, and brought her to St. Louis, where the present suit for freedom was commenced; that after said Shipman had carried said plaintiff to Indiana, said Smith had paid for him $632 54 on executions which the Sheriff had against him for some of the debts above mentioned in said mortgage. This money was paid after the execution of said deed of emancipation; that said Smith never had possession of said Milly till May, 1827, when he removed her from Illinois, as above

stated; and that said Shipman had for several years been in possession of her, till she was taken away as before mentioned.

The Circuit Court having refused to give several instructions prayed for by the plaintiff, proceeded to instruct the jury, that if they believed from the evidence, that said Shipman executed said mortgage for a valuable consideration to said Smith, that said Smith became in virtue thereof the legal owner of said Milly, and that said Milly could not be free by the residence in Indiana and Illinois, in virtue of the ordinance of 1787, unless it appeared to their satisfaction that Smith assented to the removal of said Milly; to which last instruction the plaintiff's counsel excepted, and also excepted to the refusal of the Court to give the instructions prayed by the plaintiff, which it is not considered material to notice at this time.

This Court is not disposed to view the deed of emancipation with much favor. The plaintiff cannot be regarded as a purchaser for a valuable consideration, a slave having nothing to give; but it has often been decided by the Courts of the late Territory of Missouri, and of this State, that slaves carried into Illinois with a view to residence, and staying there long enough to acquire the character of residents, do by virtue of such residence become free. The plaintiff in the Circuit Court made out a prima facia case of freedom; but if Smith be the legal owner, and did not connive at the removal of the plaintiff from Kentucky to Indiana and Illinois, then we are of opinion that the plaintiff did not acquire her freedom by such residence.

This mortgage, as it is called, was made in Kentucky, and ought to receive in our Courts, such construction as it would there receive. What construction would there be given to it, cannot be judicially known to this Court. If, as the Circuit Court decides, Smith became, by virtue of the instrument of writing executed to him by Shipman, the legal owner of Milly, and if, as it has been contended in argument, the recording of that instrument, is, by the statutes of Kentucky, notice to all persons, of Smith's right, seme evidence of the laws of Kentucky ought, we think, to have been preserved on the record. If we are to construe the writing according to our own laws, (which must govern us where the foreign law is not proved,) we are inclined to think Shipman is the legal owner; since, by the contract, the right of possession remained in him for an indefinite time, and Smith had only a lien on her to secure the payment of debts; which lien Shipman might, at any time, have defeated, by paying those debts.

The judgment of the Circuit Court is reversed, and the cause sent back for further proceedings.

OWENS v. GEIGER.

1. If A. undertakes to keep the horse of B. for pay, and keeps him according to the request of B., and the horse escapes without any negligence on the part of A., he is not liable.
2. Any act to be done, on the part of the undertaker, which forms a part of the agreement, should be set forth in the declaration; but a mere incident to such underking need not.
3. Matter more in the knowledge of one party than the other, must be pleaded by the party having that knowledge.

ERROR from Jefferson county Circuit Court.

M'GIRK, C. J., delivered the opinion of the Court.

This was an action on the case for negligently keeping a horse, as innkeeper, and permitting him to escape so that he was lost; plea not guilty, and issue joined. On the trial of the cause, it appeared in evidence that Geiger was an innkeeper, and stable-(40) keeper, and kept horses for pay, and that Owens delivered his horse to him to be kept till his return, as he was going to foreign parts; that Owens agreed with Geiger as to the feeding and keeping of the horse till his return, for which Owens was to pay a reasonable reward; that Owens told Geiger that he wished his horse to run in his yard in the day time, his legs being swelled; that Geiger said he would allow his horse to run in the lot with him whilst there; and that Owens consented that his horse might be put in the lot in the day time, if Geiger would let his horse run with him; that about four days afterward, about sundown, Geiger took his horse out of the lot to use him, and rode him off, leaving Owens' horse alone in the yard; that during the absence of Geiger's horse, Owens' horse jumped out and escaped, and was lost. Other testimony was given on both sides, none of which need be noticed for the purpose of coming at the point to be decided in this case. After the evidence was gone through on both sides, the defendant's counsel prayed the Court to instruct the jury, that if they believed that Owens' horse was put into the defendant's yard by Owens' direction, and that the horse escaped therefrom without negligence on the part of Geiger, then they must find for the defendant. This prayer for instruction was undoubtedly right. The Court then proceeded to instruct the jury: That the agreement between plaintiff and defendant, concerning the keeping and feeding said horse, as proved, was a special agreement; and that plaintiff, to maintain his action, should have set it out in his declaration specially, and that not being done in this case, they must find for the defendant. Upon this instruction the jury found for the defendant; and this instruction, among other things, is assigned for error.

We are clearly of opinion this instruction was wrong; it proceeds on the ground that the request of Owens, that his horse in the day time might run in the stable-yard, and Geiger's assent that his horse might run with him, is an essential constituent part of the undertaking, to keep safely and re-deliver the horse. The best way to test whether a thing be a part of an agreement, or only a mere incident,

is, to see if damages could have been recovered for the non-performance of the thing. Now, in this case, the thing to be done by Geiger was, to safely keep, feed, and return the horse, and if this were done, no action could be maintained against him, though he had not let the horse in the lot at all; and if the horse had been let into the lot, in the day time, though he had omitted to let his horse run with him, (41) yet this, of itself, would not form any foundation for damages. Again, that need not be pleaded which should properly come from the other party. A case in point may be found in *Stephen's Pleadings*, 355, where there was a covenant in a charter party, that no claim should be admitted or allowance made for short tonnage, unless such short tonnage were found and made to appear on the ship's arrival, on a survey to be taken by four shipwrights, to be indifferently chosen by both parties; and in an action of covenant, brought to recover for short tonnage, the plaintiff had a verdict. The defendant moved in arrest of judgment, that it had not been averred in the declaration that a survey was taken, and short tonnage made to appear—but the Court held, that if such survey of tonnage had not been taken, this was matter of defence which ought to have been shown by the defendants, and refused to arrest the judgment. *Stephens* cites for this 1 *T. R.* 638, which is not now in our possession. Furthermore in this case the rule is, that matter more in the knowledge of one party than the other, must be pleaded by the party having that knowledge. Here the manner of keeping the horse, and the manner of his escape, could not reasonably be in the knowledge of Owens, but was necessarily in the knowledge of Geiger; therefore he must defend himself in this action by giving the matter in evidence.

The judgment is reversed, and sent back to the Court below for a new trial.

(42) THE BANK OF MISSOURI *v.* MCKNIGHT'S HEIRS.

1. A. executed two powers of attorney to B.; in the *first* is given the power of making or endorsing promissory notes and bills of exchange; in the *second* the power of leasing, letting, selling or demising, as the attorney might think fit, sundry tracts and parcels of lands therein particularly named and described, and also to collect and pay all debts due or to become due, &c.—Held, to convey the power of mortgaging the land in question.
2. Where an attorney does what he has authority to do, and more, his act is good to the extent of his authority; and where he stops short of his authority, if the object of the power be accomplished, his act is also good.

ERROR from St. Louis Circuit Court.

WASH, J., delivered the opinion of the Court.

This was a proceeding by petition, under our statute, to foreclose a mortgage executed by Thomas McKnight, as the attorney of his brother, John, to the President, Directors & Co. of the Bank of Missouri. John McKnight having died, his heirs were made parties, who pleaded specially: First. That the said Thomas McKnight had no good and sufficient authority from said John to execute said mortgage. Second. That said mortgage was fraudulently executed by said Thomas McKnight, in the name of the said John, without any good and sufficient authority; and Third. That said plaintiff fraudulently procured said mortgage to be executed by said Thomas, &c. Fourth. *Non est factum* generally. The cause was submitted to the Court sitting as a jury, who found the issue on the fourth plea for the plaintiff, and the issues on the other three for the defendants, and gave judgment accordingly; to reverse which the present writ of error is prosecuted. The testimony given in the cause is all on the side of the plaintiff, and is preserved in a bill of exceptions, consisting of two several powers of attorney from John to Thomas McKnight, executed on the same day, the mortgage sued on and parol proof, that at the time of the execution of said mortgage, the said John and Thomas McKnight were severally indebted to the plaintiffs, and also that each of them, as endorser for the other, was then indebted to the plaintiffs. The first power of attorney authorized said Thomas "as substitute and proxy, (of said John,) to vote at any election for Directors for the Bank of Missouri, or on any other question that may be put at a stated or special meeting of the stockholders of the said Bank, and to do all other acts and things in (43) relation to the business of said Bank which I, myself, might or could do were I personally present, by virtue of my stock of said Bank, held by me individually or jointly with others; and to ask, demand, receive all dividends accruing on any such stock, and all other sum or sums of money due or to become due to me from said Bank, and to make and give acquittances or other sufficient discharges for the same; and also to sell, transfer and assign all my right, title and interest in and to all and every the shares of the capital stock of said Bank, held by me individually or jointly with others; and also for me and in my name to make, execute and deliver all prom-

issory notes and bills of exchange; and to endorse, assign and transfer any bill or note, and to draw all checks which shall be necessary and proper in and about the transaction of any business with, in, or through said Bank; and generally to do and perform all and every other act and thing in the premises, and in transacting my affairs and business with, in, through, or concerning said Bank," &c.

The second power gives authority to said Thomas, "to lease, let, sell or demise, as he might think fit, sundry tracts and parcels of lands therein particularly named and described, and also to collect and pay all debts due or to become," &c. The clause referring to the premises mortgaged, is in these words: "And also to demise, lease and let a certain lot of ground, whereof I am seized in severalty, lying and being in the town of St. Louis aforesaid, fronting on Main street and running to the river Mississippi, bounded, &c.; for a term of years not exceeding twenty, for such rent, or otherwise to sell, grant or convey absolutely in fee simple, to," &c. Upon this state of the record two questions present themselves: First. Had Thomas McKnight authority to mortgage the whole or any part of the lot referred to? and if not, is there any thing to show that the same was executed fraudulently? To ascertain the power we must look at both instruments, and collect the intention of the parties. The first gives the attorney power to charge the estate by making or endorsing promissory notes and bills of exchange. There is, therefore, we think, but little force in the position that the principal might not choose to have the estate encumbered with a mortgage. The words in the latter part of the clause, "to sell, grant or convey absolutely, in fee simple," are not intended to limit or point out the particular power to be exercised by the attorney, but to show that all power and authority, touching the sale or disposal of the property, was given. *Paley on Agency* (44), p. 51, says if it be to do an act upon condition, and the agent do it absolutely, it is void, and *vice versa*, but the authority cited does not support him. *Coke Litt.* 258–9., says, it has been so held *by some*; this, however, is not the law. It is now well settled, that where an attorney does what he has authority to do, and more, that his act is good to the extent of his authority; and there is no reason why it should not be good where he stops short of his authority, if the object of the power is accomplished. It is held in 3 *P. Williams*, p. 9, "that a power to sell includes a power to mortgage, which is a conditional sale." Williams is good authority, but this, in the broad terms in which the *Ld. Chancellor* lays it down, is not considered law; a special power must be pursued strictly, whether it be to sell or to do any other specific thing; but the intention of the party giving the power, (as I have before stated,) should, in all cases, govern the construction to be given to it, and determine the extent of authority. This is sufficiently seen from the two powers referred to, considering them as one act, to authorize the mortgage. From the supposed want of authority in the attorney, the Circuit Court *inferred* fraud, and found that the mortgage deed was fraudulently given and taken; this, we think, was also erroneous. The judgment of the Circuit Court is, therefore, reversed, and the cause remanded for further proceedings in conformity with this opinion.

TOMPKINS, J., dissenting.

I do not assent to the opinion of the Court, because I think the two powers of attorney are independent acts of John McKnight, and that the power to encumber the land by mortgage was not granted in the power to sell, &c., absolutely, in fee simple.

(45) MELTON v. M'DONALD, ADM'R.

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1. To mantain an action of *detinue* for goods, the plaintiff must have the right of property in himself and the immediate right of possession;—the gist of the action being the wrongful detainer and not the original taking.
2. In setting forth the cause of action, it must be shown that the goods, &c., were the plaintiff's, and an omission to do so will be fatal, even after verdict.
3. Where the plaintiff sued as administrator, showed property in the intestate, and possession and detainer by the defendant, since the death of the intestate—held, that an action would not lie; the possession and detainer being against the administrator in his own right.

ERROR to St. Louis Circuit Court.

TOMPKINS, J., delivered the opinion of the Court.

M'Donald, as administrator of Daniel Polk, alias Pogue, sued Melton in an action of detinue for some slaves, and had judgment, to reverse which Melton sued out his writ of error.

The facts on which the verdict was found, on which this judgment was rendered, are the same as those which were the basis of the action of M'Donald *v.* Walton,* decided at this term, except that the acts of the General Assembly of the State of Kentucky were not given in evidence. In this case it is not then material to notice more than two of the errors assigned, which are: First. That the verdict and judgment are for the aggregate value of the slaves. Second. That the evidence does not support the declaration. The declaration contains two counts. In the *queritur* the plaintiff calls himself administrator, &c., of Polk. In the first count he states his cause of action thus: For that whereas, said Polk, &c., in his life time, on 1st Jan., 1803, at, &c., was lawfully possesed, as of his own right and property, of certain goods and chattels, &c., and being possessed thereof, the said Polk afterwards, to-wit: on, &c., at, &c., casually lost the said, &c., and the same, &c., on the 10th June, 1826, came into the possession of said Melton by finding. The second count states the cause of action as the first did, except that the birth of some children, descended from two of the slaves, is alledged to have taken place between the 1st of January, 1803, and the 10th June, 1826, and both counts then deny that the slaves were restored to the intestate in his life time, or to the administrator since the death of the intestate.

To maintain this action for goods, the plaintiff must have the right of property in himself, and the immediate right of possession. The gist of the action is the wrong-
(46) ful detainer, and not the original taking. See 1 *Chitty*, 121–2, and authorities there cited. In the statement of his cause of action, it must be shown that the goods, &c., were the plaintiff's, either by words "of the plaintiff," or that he was possessed of the goods, &c., or the omission will be fatal, even after verdict, the objection be-

*See next case.

ing the want of title, and not a title defectively stated. 1 *Chitty* 367, and cases there cited. But when the right of action accrues to the intestate in his life time, and the administrator wishes to sue in the right of the intestate, then he must show property in such intestate, and a wrongful detainer in his life time; then averring the death of the intestate and his own appointment as administrator, he shows his right to a recovery. This plaintiff has chosen here to show property in the intestate.

The proof is, that in 1807 or 8, Polk died possessed of these slaves, except those born since his death; that in a few weeks after his death, the widow removed from Kentucky, where he died, to St. Louis county, and married one Chapman, from which marriage came the wife of Melton, as whose portion Melton received, by her father's will, these slaves. Polk being dead many years before Melton had possession of these slaves, could never have had, on account of such possession and detainer, any right of action against him; and it is in vain that the declaration shows the slaves to have been lost several years before Pogue's death; the testimony does not bear it out; and the action must be brought in the right of him against whom there was a wrongful detainer. M'Donald had no election to make, there being no detainer against his intestate; it is in vain that he resorts to fiction, by stating that Polk or Pogue lost in his life time. He should have stated, as he has proved, that he (the administrator) was possessed as of his own right and property of, &c., and lost them—the losing certainly is fiction, but the right to the property is such a right as must be proved, and could, under the decision of this Court, have been proved, for so soon as he took out letters of administration, he became vested with a right to all the property found in this State, of which Polk had the right at the time of his death—and having the right of property coupled with an immediate right of possession, he had a right to feign a possession in himself for the purpose of maintaining this action. It is not (47) sufficient that he has stated the possession to be in his intestate, for even had he averred the death of Polk, (which has not been done,) he could only have made out his right of property by argument, and the rules of pleading requires that facts must be stated clearly and distinctly. See 1 *Chitty*, 236. Had a right of action accrued for a promise to pay money to the intestate, in his life time, there could have been no election left to the administrator, he would have been compelled to bring his action in the right of the intestate, and then the promise must have been stated, and proved to have been made to the intestate; and proof of a promise made to the administrator, would not have supported a count on a promise to the intestate. *Starkie*, part 4th and vol. 2, p. 541, and authorities cited.

But when there is a wrongful detainer against the intestate in his life time, which is continued against the administrator, he may make his election to sue in the right of the intestate, or in his own right; if he elect to sue in the right of the intestate, he must produce proof of a wrongful detainer from the intestate; but if he elect to sue in his own right, and prove a detainer from himself, then he must, in his declaration, show a right of property in himself, either by the words "of the plaintiff, or that he was possessed of the goods, &c." What may be the consequence of the first error assigned, it is not material to decide now. The authority cited (10 *Co. Rep.*, 119,) shows that if no value is found, the defect cannot be supplied by a writ of inquiry: but here the aggregate value is found, and there are authorities that the defect in such cases may be supplied by a writ of inquiry. We are, therefore, willing to leave this to be decided when it shall be more minutely investigated by counsel, than it has been in this case. The declaration is not supported by the evidence, and

the Circuit Court should so have instructed the jury, when requested by the defendant.

The judgment is, therefore, reversed, and the cause remanded for further proceedings in conformity with this opinion.

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(48) M'DONALD, ADM'R., *v.* WALTON.

1. By the laws of Kentucky, regulating descents and distributions, slaves are held to be real estate; and for want of issue of the intestate, of father, mother, brothers, sisters and their descendants, if there should be no paternal or maternal kindred capable of inheriting on the one side or the other—the whole goes to the wife or husband of the intestate.
2. Slaves belonging to the estate of deceased persons, go to the administrator, to be by him disposed of as the law directs.

APPEAL from St. Louis Circuit Court.

TOMPKINS, J., delivered the opinion of the Court.

McDonald sued Walton in an action of detinue for some slaves. At the March term of the year 1827, judgment was rendered for Walton in the Circuit Court. McDonald appealed to this Court, and at the May term of the same year, the judgment of the Circuit Court was reversed, and the cause sent back to the Circuit Court for further proceedings. At the November term of the Circuit Court for the same year, judgment being again given for Walton, McDonald appealed to this Court. The facts as they now appear in the bill of exceptions, are as follows, viz:—In the year 1805, Daniel Polk or Pogue married Rebecca Walton in the State of North Carolina; before and at the time of the marriage, Polk was possessed of certain slaves, mentioned in the bill of exceptions, and for which slaves and their descendants this action was brought. Shortly after their marriage, Polk and his wife removed from North Carolina to Kentucky, and settled on an Island in the Ohio river, taking said slaves with them. In January, 1807 or 8, said Polk died intestate at his residence in Kentucky, and about the last of February or the first of March, next thereafter, his widow left Kentucky, and came to Upper Louisiana, now Missouri, bringing with her the said slaves, and one other, born in Kentucky, of the first mentioned. Polk had no children, and at the time of his death, no family living with him except his wife and slaves. In the month of April of the same year, the widow intermarried with one Absalom Chapman, a young man without property. Soon after their marriage, Chapman and his wife went to Kentucky on a visit, and after an absence of a

few months, returned and settled at Point Labbadie, in St. Louis county, having said slaves in their possession. After being there something more than a year, they removed said slaves to the lower country to some place unknown, either in the Mississippi or Orleans territory. A few years afterwards, in the year 1815, Chapman and (49) his wife returned to St. Louis county, bringing with them the said slaves and their increase, and remained in possession of them till 1817, when Chapman died, and a few months after, Rebecca, his wife died. The plaintiff proved, that on the 19th June, 1826, he obtained letters of administration on Polk's estate, in St. Louis county.

Chapman appointed the defendant, Walton, his executor. Walton proved the will and took on himself the execution thereof, as executor, and took possession of said slaves and their increase, and continued to hire them out, as executor, until the year 1823, when he settled his testator's estate, and continued his possession of said slaves, as guardian of the infant children of Chapman and said Rebecca; and in that character hired out said slaves from year to year, till September, 1824, when he delivered to William Melton, husband of his ward Narcessa, daughter of Chapman and wife, a part of said slaves as his portion of Chapman's estate; the defendant continued to hire out the remaining slaves till September, 1825, when he hired one of them to McDonald, the plaintiff, and two to one Waldo, neither of which have been returned to the defendant, and they are all three now in the possession of the plaintiff in this action, appellant here. The remaining part of said slaves are still under the defendant's control, and hired out by him. Chapman and wife, before they departed hence for the lower country, expressed much uneasiness lest these slaves should be set free under Polk's will, about which there was much talk. When Chapman and wife lived in Point Labbadie, there were but few families in the Point, the settlement being on the frontier. Polk had been heard to say, before he was married to Rebecca Walton, that he had no relations in America known to him; it was also in evidence, that said Rebecca, soon after Pogue's death, and before her removal from Kentucky, had been heard to say, "that she was much afraid that said slaves would be taken away from her, as Polk had, in his life time, made some arrangements with a man at the Red Banks about keeping or taking care of said slaves after his death," and gave this as a reason for her removal from Kentucky with said slaves. Some Kentucky statutes were read in evidence, which will be noticed hereafter; and no other evidence, material to be here noticed, was offered. The defendant prayed the Court to instruct the jury: First. That if the jury find, from the evidence, that Polk died intestate in the State of Kentucky, in 1807 or 8, without any issue or other descendants, and without leaving any father, mother, brother or sister, or their, or either (50) of their descendants, and without leaving any paternal or maternal kindred capable of inheriting, the whole of said slaves which belonged to said Pogue, and which he had with him in Kentucky at the time of his death, descended to Rebecca his wife, as his heir at law. Second. If the jury find, from the evidence, that Rebecca, widow of Pogue, was entitled to the slaves of which Pogue died possessed, and that said Rebecca and those claiming under her, have been in the uninterrupted exclusive possession of said slaves, under a claim of title adverse to all other persons, for a period of fifteen years consecutively, they ought to find for the defendant. To which instructions the plaintiff objected. The Court gave them as requested. The plaintiff then prayed many instructions, three of which, only, will be noticed, the rest being substantially contained in those three: First. If the jury find, from

the evidence, that Pogue died intestate in the State of Kentucky, in the year 1807 or 8, without any issue or other descendants, and without leaving any father, mother, brother, sister, or their or either of their descendants, and without leaving any paternal or maternal kindred capable of inheriting, yet the wife of said Pogue, and those claiming under her as her descendants, are not heirs at law of said Pogue, and cannot take, as heirs at law, any property, real or personal, left by said Pogue at the time of his death. Second. That no length of possession of Pogue's negroes, and their descendants since his death, by Pogue's widow and those claiming under her, before administration on said Pogue's estate, can confer a right of property in said negroes in said widow and her representatives, and those who claimed under her. Third. That notwithstanding the jury may find, that Mrs. Pogue, widow of Daniel Pogue, and those claiming under her, are the heirs at law, under the laws of Kentucky, still this will not operate as a bar to the plaintiff's right to recover in this action. These instructions were refused. The points growing out of these instructions, and which only it seems necessary to decide, are: First. Whether Mrs. Pogue, widow of the intestate, afterwards married to Chapman, could, by the laws of Kentucky, take the negroes by descent from her husband, in case there were at the time of his death, no father, mother, brother or sister, or their or either of their descendants, and no paternal or maternal kindred capable of inheriting from Pogue Second. If there were no such person capable of inheriting from Pogue, and the wife took by descent, whether she or the administrator be entitled to the slaves. Third. Whether the ad- (51) ministrator be not barred by the length of the defendant's possession, even should he be entitled in the first place, to the slaves to be administered on.

First. Pogue died in Kentucky, and all his property must be distributed agreeably to the laws of the country where it was at the time of his death; it was in Kentucky when he died, and must then be distributed according to the laws of that State; and by the 28th section of an act of the General Assembly of the State of Kentucky, passed 8th February, 1798:—All negroes, &c., shall be held, taken and adjudged to be real estate, and shall descend to the heirs and widows of persons departing this life, as lands are directed to descend in and by an act of the General Assemby, entitled, "an act directing the course of descent." By the 14th section of which act it is provided, that where for the want of issue of the intestate, of father, mother, brothers, sisters and their descendants, *if there shall be no paternal or maternal kindred*, capable of inheriting, on the one side or the other, the whole shall go to the wife or the husband of the intestate;" both sections of these several laws appear on the bill of exceptions, to have been given in evidence. The slaves, then, in this case would descend to the wife. This point is ruled for the defendant. Second. The administration being granted in Missouri, and the property found here, it certainly, under our own laws, goes to the administrator to be by him disposed of as shall be directed by the laws of Kentucky. This point is then ruled for the plaintiff. Third. The defendant depends on his long and undisturbed possession. Of all the cases cited by the defendant that of Brent *v.* Chapman is the strongest. Chapman brought an action of trespass against Brent, for taking in execution on *fi. fa.* against the estate of Robert Alexander, deceased, a slave named Ben, claimed by Chapman as his property. Judgment was given for the plaintiff, and on error that judgment was affirmed in the Supreme Court of the United States. These are the facts of the case: The slave was the property and in the possession of the late Robert Alexander, the elder, at the time of his death: his sons, Robert and Walter S.,

were named executors of his will, but never qualified as such. On the 17th December, 1803, Walter S. took letters of administration with the will annexed. No division was ever made by the order of any Court of the personal estate of the deceased among his representatives, but previous to August, 1800, a parol division of the slaves was made; Robert Alexander the younger, and Walter S. Alexander, the latter (52) being then under the age of 21 years, Robert A. being possessed of the slave and being taken on execution for debts due from himself in his individual character, in August, 1804, took the oath of insolvency under the laws of Virginia, and delivered up to the Sheriff the slave, as a part of his property included in his schedule. The Sheriff sold him at public sale, and the plaintiff knowing the slave to belong to the estate of the deceased, Robert Alexander, as aforesaid, became the purchaser for a valuable consideration, and took possession of the slave and continued in possession, under the sale and purchase, until July, 1806. Dunlap & Co. obtained judgment against Robert A., the younger, as executor of his father Robert A.; and upon *fi. fa.* issued on that judgment, the Marshal seized and took the slave as part of the estate of the testator R. A., there being no property belonging to the estate in the county, which could have been levied on, except what R. A., the younger had sold and disposed of for the purpose of paying his *own debts*. The Supreme Court of the U. S. decided that the possession of Chapman, the plaintiff, gave him a good title to maintain his action on the same principle that the defendant may protect himself, under that length of possession under the statute of limitations, notwithstanding there was no executor or administrator of the deceased to be sued, and the plaintiff knew the slave belonged to the estate of R. A., deceased, and not to R. A., the younger, for the payment of whose debts the slave was sold, when Chapman, the plaintiff, became the purchaser.

The Chief Justice, in delivering the opinion of the Court, said, the only objection of any weight, was, that there was no administration upon the estate of R. A., sen., and consequently, that the possession of Chapman was not adverse possession. But there was an executor competent to assent, and who did assent to the legacy and to the partition between the legatees, and who could not afterwards refuse to execute the will. We may further add, that the creditors of R. A., deceased, might, on the neglect of the executors, have taken out letters of administration. The case before this Court is somewhat different. Pogue, the intestate, died in Kentucky; and in less than than two months the widow removed to a distant country, before one could reasonably suppose there could have been any administratisn of the estate, agreeably to the laws of any civilized country. When this cause was before this Court on a former occasion, no evidence of the laws of Kentucky was preserved, and it was insisted, in argument, that ought not to entertain any sus- (53) picions against the rights of the defendant, because, for any thing known to the Court, administration might have taken place there in a very short time, or no administration might have been necessary; but the Court then thought that enough had been proved to throw the burthen of proof on the defendants. In addition to the evidence before the Court at the May term of last year, there are now several statutes of the State of Kentucky, by which it appears that the widow of Pogue might probably be the legal owner of the slaves in question, after Pogue's death, and if so, the children would take under their father's will. The case of the defendants certainly appears more favorably now than it did at the former trial; and this Court is so little disposed to disturb the long and uninterrupted possession

of property, that it would, perhaps, after such a length of possession as has been proved, have been inclined to leave it to a jury to presume an administration of Pogue's estate, had the widow remained even six months in Kentucky. The authorities cited by the defendant all require that the title by possession should have been acquired without force or fraud; and although the possession of the defendant was acquired by lawful means, yet it must be remembered that his testator's right was derived through the widow of Pogue, and all claiming under her must be affected by her acts. It is true, that if there be no debts due from Pogue, the widow, being probably entitled under the laws of Kentucky, to take the property, it would be very vexatious to pass over all this property to the administrator, merely to entitle him to his compensation, when the consequence will be, that all the estate must be again distributed among persons now holding it. This case is put under the impression that Pogue may have no relations entitled to take before the widow. If it were possible to suppose a man so mischievous as to be willing to undertake such an administration merely to harass the defendant, still we have no power to require him to give proof of the existence of any demands against the estate: but we are not justified in supposing so extraordinary a case may often exist; and where any latitude in the construction of laws is allowed, the Court must be guided by circumstances of more probable occurrence. Should, however, the County Court, on the settlement of accounts of the administrator, find that there is reason to believe that he undertook the administration merely for the purpose of vexation, he is somewhat in the power of that Court. It has the power of restricting him to very moderate compensation, and would probably do so.

(54) By the 29th section of an act of the General Assembly of the State of Kentucky, entitled an act directing the course of descents admitted by both parties in the bill of exceptions to be the law of Kentucky, negroes may be taken in execution for the payment of debts. Without resorting to the decisions of the Kentucky Courts to show that the administrator would have the right to the slave of his intestate to satisfy debts, we are satisfied that our own laws would give the administrator the disposition of any of Pogue's property which by the law of Kentucky is subject to execution to pay his debts. It has been contended also that our law allowing letters of administration on the estate of persons dying abroad being passed long since Pogue's death, cannot act retrospectively so as to give the administrator a right to the property of Pogue. This argument appears to be entitled to very little authority. Administration is not granted to advance the interest of the administrator. It is done for the purpose of securing the property of the deceased to the rightful owners; and the administration of an estate is so troublesome an office, that it is very seldom sought after by well disposed persons: and the community is under obligations to any honest man that will undertake such an office. Suppose for an instant that there never had been any law in Missouri to authorize letters of administration on the estates of intestates; and that the Legislative body in actual session should pass such a law as we have now in force, would it be reasonable to suppose that the estate of a man who died yesterday intestate, should be the prey of any unprincipled person who might choose to seize on it, while an infant orphan might be left without the means of subsistence. The right of the administrator in such a case could not divest that of the legal heirs, but would be in support of them. This point, then, is ruled for the plaintiff.

The plaintiff's first instruction seems, then, to have been rightly refused. His second instruction was of so general a character as not to be necessary in this case, and if necessary, it would have been, perhaps, properly given against him. His third instruction should have been given. The first instruction prayed for by the defendant was properly given; but the second should have been refused.

The judgment of the Circuit Court is reversed, and the cause must be sent back for further proceedings.

WASH, J., dissenting.

I dissent from the opinion given above, upon the ground that the possession of the defendant (from analogy to the statute of limitations) should not be divested by administration.

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(55) CORNELIUS *v.* M'DONALD.

In an action of debt for 10,000 feet of plank, to be delivered at a certain time and place—held, that no demand was necessary, and that the defendant might show a readiness on his part to deliver, &c. (Note *a*.)

ERROR from the Franklin Circuit Court.

WASH, J., delivered the opinion of the Court.

This was originally an action of debt, brought by M'Donald against Cornelius, before a Justice of the Peace, founded upon the following instrument in writing: "On or before the first day in August next, we or either of us promise to pay John M'Donald 10,000 feet of good merchantable pine plank, delivered at our mill, as witness our hands, this 19th day of June, 1825. (Signed) John R. Robertson [Seal,] Absalom Cornelius [Seal.]" On the trial before the Justice, M'Donald had judgment, from which Cornelius appealed to the Circuit Court; upon trial *de novo*, M'Donald offered the above instrument of writing in evidence, and proved the value of the plank at the time and place specified in said instrument, but did not prove any demand whatever of the plank mentioned, either at the mill or any other place, and obtained judgment; to reverse which Cornelius prosecutes his writ of error in this Court. The error assigned is general. The point relied on is, that the Circuit Court erred in refusing to instruct the jury "that the plaintiff had not shown himself entitled to recover, for the reason that he had not proved any demand of the plank, or

want of readiness," &c. The doctrine in relation to such property contracts, as well as the contracts themselves, are pretty much the growth of the western country, and have sprung up amongst a people whose character and circumstances are peculiarly that of a trading and *trafficing* people. In settling the principles of law applicable to such contracts, policy would dictate conformity to those governing money contracts, where reason and the obvious intention of the parties do not forbid it. In Kentucky, such contracts were in early times very common, and we find many cases in their reports, some of which seem a little contradictory.

In the cases of Letcher v. Taylor, and Chambers v. Winn, (in note,) *Hard.* p. 80, the contracts were for the payment of property on *demand*, without naming a place. The declaration stated a demand at the county, &c., and the Court held that a demand at the residence of the obligor was necessary: which the plaintiff ought to alledge (56) and prove. The case of Welmouth v. Patten, 2 *Bibb*, 280, is where no *place* for the payment or delivery of the property was named, and the Court decided "that a demand at the obligor's residence must be averred, &c." On a contract in England for the delivery of cumbrous property, where no place had been named, it is held to be the duty of the obligor to wait on the obligee, and know of him where he will receive the property, and to tender the property on the day at the place appointed, &c. But upon contracts payable at a time and place stipulated and expressed, it has been held that no special demand is necessary, and so the Court of Appeals in Kentucky have decided in the case of Grant v. Grashon—*Hard. Rep.*, p. 85—and sundry cases there cited. The case of Shrewsbury v. Buckley, 4 *Bibb*, 260, was on a covenant for delivery of 6,000 bushels salt at their (the obligor's) furnace on the Kenawha, in good and sufficient barrels, well packed and nailed; one thousand bushels thereof per month, for six months thereafter, &c.; in which the Court held that no demand was necessary, and that the defendants might show a readiness on their part to deliver, &c. This is believed to be the correct doctrine on the subject; it imposes no hardship upon the defendant, or obligor, if the property was, in truth, ready at the time and place, to plead and prove it—whilst the contrary doctrine might subject the plaintiff or obligee to much trouble and expense in making a demand which he knew before hand could not or would not be satisfied.

The judgment of the Circuit Court is, therefore, affirmed, with costs.

(*a.*) See Martin v. Chauvin, 7 Mo. R., 280.

Decisions of the Supreme Court of Missouri,

ST. LOUIS DISTRICT, NOVEMBER TERM, 1828.

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M'NAIR AND OTHERS v. LANE.

1. The Supreme Court may award execution, to carry into effect their decisions.
2. It is no variance from the judgment, for the Clerk to blend in the execution, the interest, damages, and costs. (Note *a.*)
3. Under a proceeding by attachment, the plaintiff may dispense with bail, on the appearance of the defendant.

ERROR to St. Louis Circuit Court.

TOMPKINS, J., delivered the opinion of the Court.*

This was an action of ejectment, commenced in the St. Louis Circuit Court, by the defendant in error, for the recovery of a house and lot, situate in the city of St. Louis.

Upon the trial in the Court below, the plaintiff produced a witness to prove that the defendants claimed title to the premises in question under a certain William Schlater. The plaintiff then produced and gave in evidence the record of a judgment in favor of Theodore Hunt, against said William Schlater, and of the execution issued thereon, and of its return. By this record it appears that Hunt commenced an action against Schlatter by attachment.

It was agreed by both parties, that the defendant might appear and plead, without giving bail, and that the attachment should not be dissolved. Schlater, the defendant, accordingly appeared and pleaded; and on the plea of the non-assumpsit, a verdict was found, on which a judgment was rendered against him.

This case being brought into this Court by a writ of error, this Court affirmed the judgment of the Circuit Court; and an execution, on the judgment here given against

* Absent, Judge Wash.

(58) Schlater, was issued against his goods, &c., generally. The defendants in the case now before the Court, offered in evidence a copy of a deed executed by Schlater to some of the defendants, which was rejected by the Circuit Court, because the reasons for the absence of the original were thought insufficient. Judgment was given for the plaintiff, to which the defendants, now plaintiffs in error, wish to reverse, and assign for error: —

First. That the Circuit Court admitted the record of the Supreme Court, in the case of Hunt *v.* Schlater, to be read in evidence.

Second. That Clemens, a witness, was admitted to prove the title of the plaintiffs in error, under Schlater.

Third. That the Circuit Court refused to permit to be read in evidence the copy of the deed from Schlater to the defendants.

Fourth. That the Circuit Court refused instructions prayed for by the defendants.

Fifth. That the Circuit Court admitted in evidence, the deed of the Sheriff to the plaintiff, defendant in error here.

On the first error assigned, it is contended that,—

First. That the judgment rendered by this Court, in the case of Hunt *v.* Schlater, was void, because the judgment in the Circuit Court remained in full force, unaffected by the writ of error, and upon that writ the Court had no further jurisdiction of the cause than is given by the statute. By 50th section of the law regulating "proceedings at law," the Court is required to examine the record and to award a new trial, reverse or affirm the judgment or decision of the Circuit Court, or to give such judgment as the Circuit Court ought to have given, as to them may seem according to law. This Court, it is contended, has only an authority to give judgment in cases where the judgment of the Circuit Court is erroneous, but where that judgment is affirmed and in force, the Circuit Court alone can grant execution of its own judgment. By the 52d section of the same law, it is provided "that in all cases of appeal on writs of error, decided by the Supreme Court, the Supreme Court may order the record in the cause, with the decision and determination thereon written, &c., to be transmitted to the proper Circuit Court, &c., and such decision and determination shall be duly carried into execution by such Circuit Court, or the Supreme Court may award execution to carry the said decision and determination into effect."

By the last cited section, ample powers seem to be given to this Court, and not (59) without reason. The execution, too, a link in the chain of the title of the defendant in error, as necessary as the Sheriff's deed, it is contended, varies from the judgment so materially that it cannot be said to have issued on that judgment.

The judgment is for $1791 72 damages adjudged by the Circuit Court, with interest thereon amounting to $52 28, and $89 58 for further damages sustained by reason of the said debt, (meaning the sum adjudged by the Circuit Court,) together with costs. The execution is for the same sum adjudged by the Circuit Court, for $141 86, for his further damages and interest by reason of the detention of the said debt, and $57 71 for his costs. We think this is no variance. The Clerk has used a discretion in adding together the damages and interest allowed in the judgment; had he made a mistake it might have been corrected, but none is made; he has also very properly ascertained the amount of costs, and inserted them separately in the execution. The law allows him to ascertain the amount of costs and to add them to the damages, for the purpose of making out an execution, which is conceived to be a greater liberty than he has here taken. The form of the execution given in the act

is: "Whereas, A. B., &c., hath recovered against C. D. for debt or damages, (as the case may be,) and also the sum of ———, which to the said A. B. were adjudged for his damages, as well by reason, &c., as for his costs in that suit expended, &c." In the case before the Court, the Clerk has even been more exact than he was required by the law; he has indeed added together two sums ascertained by the Court, but he has not blended the amount of the costs with that of the damages and interest, as he well might have done, consistently with the form here given in the statute, for it has not been pretended that the law requires the Court to tax the costs before judgment is rendered.

It is also contended that the execution is void, because the attachment, by agreement of parties, remaining undissolved, execution could go only against the property attached: to this it is answered, that proceedings by attachment are only allowed against absent and absconding debtors. The plaintiff in the Circuit Court might well dispense with bail on the appearance of the defendant: it is merely personal to him, for had he agreed to take a pauper for bail, the Court could not have objected. Idle then would it be to say, that the Court should have taken bail, notwithstanding the agreement of the parties.

But when the party appears and pleads, it is the law that directs the judgment (60) which is to be given, and not the agreement of the parties.

It was objected also, that the Sheriff's deed did not recite the execution correctly, viz: that it corresponds neither with the execution given in evidence, nor with the judgment.

The execution recited gives the number of cents less than one dollar, in the form of a fraction of dollar, for instance: The sum adjudged by the Circuit Court is thus expressed: one thousand seven hundred and ninety-one dollars and seventy-two cents; and in that recited in the deed, after writing the number of dollars, the number of cents is thus expressed: 72-100 dollars. We think this a distinction without difference.

The other errors assigned appear to us to have been well abandoned, both in the written argument and in that at the bar.

The judgment of the Circuit Court is affirmed.

(a.) See Wash v. Foster, 3 Mo. R., p. 205.

COWDEN v. ELLIOT.

A debt due to a defendant as a surviving partner, may be set off against a demand upon him in his own right, and so *vice versa*.

ERROR from the Circuit Court of St. Louis.

M'GIRK, C. J., delivered the opinion of the Court.

Cowden brought an action of debt against Elliot, on a bond given by him to Cowden and one Sanderson; the declaration shows that Sanderson was dead before the action was brought. Elliot put in a plea of set-off, alledging that Cowden and one Keene were jointly interested in the navigation of a boat, and that Cowden, as such part owner, employed him to navigate the boat. Issue was taken on this plea. At the trial, Elliot proved his plea exactly, and the Court decided that the evidence was insufficient in law to enable him to claim a set-off under the plea.

It is clear that the Court considered this matter as on a demurrer to the plea, and in that way held that the matter of set-off could not be allowed. The proof must fit the allegation; in this case it did do so, and the Court did wrong to exclude (61) it. But as the argument of the counsel, and the opinion of the Court, turned on the point whether in this case the matter of the set-off could be allowed by law, I will endeavor to meet the point.

It is objected that Elliot's demand wants mutuality, and that it is a joint demand against Cowden and another, and therefore cannot be set off. To prove the position correct, 6 *Bac. Abr.* 136 is cited. No doubt this is correct doctrine, according to the decisions under the British statute; it is correct as a general rule; yet I consider it to admit of some modifications. By two cases, if not more, decided by the British Courts, I find in the above cited page of *Bacon* this doctrine: That a debt due to a defendant as a surviving partner, may be set off against a demand upon him in his own right, and so *vice versa*. To prove this, Slipper *v.* Stedstone, 5 *T. R.* 493, and French *v.* Andrede, 6 *T. R.* 583, are cited. I have looked into the cases and they fully support the point.

These cases show that although the demand was at one time in a condition that it could not be set off, yet when it became a sole or separate demand by the death of a partner, it might be set off. But this matter all aside, I am most clear that this demand of Elliott may, under our statute, be set off. The statute says, page 738 of the *Revised Code*: that if two or more persons be mutually indebted to each other by judgments, bills, bonds, bargains, &c., and one of them commence an action, one debt may be set off against another, notwithstanding such debt may be deemed in law of a different nature. The statute requires that the debts should be mutual. The meaning of this is, that A., the plaintiff, should be indebted to B., the defendant, and not that A. should be indebted to B. and another jointly; but by the above case cited from *T. R.* if one of the debts was a joint one, and by the death of one of the obligors or obligees, it became the sole debt of the other, or a sole right of a surviving obligee, then it may be set off. Our statute has done the same thing the

common law would have done, where one of the joint obligors is dead. In that case the whole obligation would survive against the surviving obligor, and it would be a sole demand against him. By the fourth section of the act defining the effect of contracts, *Rev. Code*, 215, it is declared that all contracts which were by the common law deemed joint, shall be deemed joint and several to all intents and purposes. And by the latter clause of that section, it is declared that all joint assumptions of co-
(62) partners and others may be sued on separately.

It seems to me to be clear that this demand against Cowden was his sole debt to all intents and purposes, though the other partner was also liable. If it was a several demand against him, it may be a set-off; the mutuality required by the law would exist.

The judgment of the Circuit Court is reversed, and sent back for a new trial.

TOMPKINS, J., dissenting.

Cowden, survivor of Sanderson, sued Elliot on a note made to Cowden and Sanderson by Elliot. Elliot sets up a demand which he has against Cowden and Keene, and claims a set-off. By the act regulating set-off, "if two or more persons be mutuelly indebted to each other by judgments, bills, bonds, bargains, promises, accounts or the like, and one of them commence an action in any Court, one debt may be set off against the other, notwithstanding such debts may be deemed in law of a different nature."

At common law, if the plaintiff was as much or more indebted to the defendant than the defendant was indebted to him, yet he had no method of striking a balance, the only way of obtaining relief was to go into a Court of Equity. To remedy this inconvenience, the several statutes of set-off were passed in England. Under these statutes it has often been decided that a joint demand cannot be set off against a separate demand, and that a separate demand cannot be set off against a joint demand; for the demands are not mutual, and at common law the action must be brought against all the joint obligors: therefore, if A. sue B. on his bond for $100, B. could not set off the bond of A. and C. made to B. for the same sum, because he could not have an action against A. alone on the joint bond of A. and C.

But by our act defining the effect of contracts and promises from and after 12th February, 1825, all contracts which by the common law are deemed joint, shall be construed to be joint and several to all intents and purposes.

B. then can sue A. alone on the joint obligation of A. and C. to him, he may then have this joint demand against A. and C. set off against the separate demand of A. against himself, and there is no injustice in it; for at common law even A. was liable to B. for the whole demand.

But if A. and C. had sued B. on his obligation to them, it does not follow that B. can set off a separate demand against A. Our statute gives B. no right to sue A. and
(63) C. on a bond executed to him by A., although he may have executed his bond to them for any sum of money. If, then, B. have no right to sue A. and C. on the bond of A. made to B., what right has he to set off his demand on A. against the demand of A. and C. But suppose, as in the case before the Court, C. were dead and A. were to sue B. on the bond, suggesting the death of C., what would then have been the remedy of B. before the enactment of the statute of set-off? He would have gone into a Court of Equity and prayed that he might be allowed to set

off against the demand of A., survivor of C., so much of his demand against A. as would balance the interest of A. on the bond on which he, A., as survivor of C., had sued B., and such relief and no more would have been given him. A Court of Law, then, if it were to allow a set-off in such a case, could do no more than a Court of Equity. But it appears to me that a Court of Law ought not to allow a set-off in such a case, for it has not the same means of ascertaining A.'s interest in the bond as a Court of Equity has. The case before the Court is even harder than the case which I have stated; for Elliot claims to set off not a separate demand against Cowden, but a joint demand against Cowden and Keene—thus making the estate of Sanderson not only pay the debts of Cowden, which Sanderson never promised to do either directly or indirectly, but also the debts of Keene. It seems to me that the act defining the effect of contracts and promises, was intended only to affect the remedy against joint obligors or promisors, and that the law of set-off can be no otherwise changed by it than to allow a defendant to set a joint demand off against a separate one.

The laws of set-off was certainly never intended to give a defendant rights against a plaintiff, against whom he could have recovered nothing before the enactment of that law; two cases from *Term Reports* have been cited, neither of which seems to me to meet the case. In Slipper *v.* Stedstone, from 5 *T. Rep.*, the defendant sets off a demand due from plaintiff to defendant, and another deceased against a demand due from defendant to plaintiff; and in the case of French *v.* Andrade, from 6 *T. Rep.* the defendant sets off a demand due from the plaintiff and a deceased partner to defendant, against a demand due from defendant alone to plaintiff alone.

In each of the cases cited, the plaintiff is liable to pay the whole demand set off, and there is no doubt but both in law and equity he has a right to appropriate his (64) own separate demands against the defendants, in each case, to the payment of the demands set off against him. But in the case before the Court, has he, in law or equity a right to appropriate the interest of Sanderson's representatives, in the writing sued on, to the payment of separate demands against himself? It is true, if he were to collect the money due to himself, as surviving partner of Sanderson, and appropriate it to the payment of his own debts, that Sanderson's representatives would have no remedy but against him. But if Sanderson, in his lifetime, were willing to trust to the integrity of Cowden to pay over to him, or to his representatives after his death, his portion of the demand against Elliot, this furnishes no reason to presume that he was willing that Elliot should appropriate the same demands to the payment of his (Elliot's) demand against Cowden and Keene; and without his assent, can even the legislative power itself appropriate his property to the payment of the demand of Elliot against Cowden and Keene? No assent, either express or implied, appears to me to have been given.

To illustrate this case more fully, I will suppose that at the death of Sanderson there had been joint stock left, belonging in equal portions to himself and Cowden, and will suppose that they had been partners in trade, and that after the death of Sanderson, Cowden absconds, and Elliot sues out an attachment to secure the same demand against Cowden and Keene, but finding no property of Cowden or Keene, he finds exactly enough of the property of Cowden and Sanderson, deceased, to satisfy the demand of himself against Cowden and Keene. It appears to me very plain, that no more than the interest of Cowden could be sold to satisfy the demand, and it appears to me equally as plain, that it would be as much a violation of law and

justice to allow Elliot to appropriate the demand of Cowden and Sanderson against himself, as the stock in trade of the same persons to the satisfaction of his demand against Cowden and Keene; and yet if Cowden wished, he could sell the joint stock in trade, and apply the money so raised to the payment of his own debts. I am inclined to think that the Legislature never intended to allow a set off where he could not have made the same party liable in a cross action for his whole demand. In the lifetime of Sanderson, Cowden and he must have joined in this suit, and no cross action could have been brought by Elliot for his demand on Cowden and Keene. The (65) justice of the case is not changed by the death of Sanderson, for his interest survives to his representatives.

For the reasons above given, I think the judgment of the Circuit Court ought to be affirmed.

HEMPSTEAD ET AL. v. STONE, BELLOWS ET AL.

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1. Where a declaration in assumpsit charges a joint contract, and the Court sitting as a jury, find that some of the defendants did assume, and others did not assume in manner and form, &c., and gave judgment for those who did not assume, and against those who did – held, to be error.
2. Errors in the judgment of the Circuit Court, in departing from the pleadings or verdict, will be noticed by this Court, though no objection be made in the Court below.
3. A former recovery may be given in evidence, on the plea of non-assumpsit.
4. The declaration must alledge that all promised; that the promise was a legal one at the time it was made; and that the demand was due and owing at the time of bringing the action. And the proof must support the allegations.

ERROR from St. Louis Circuit Court.

M'GIRK, C. J., delivered the opinion of the Court.*

This was an action of assumpsit, brought by Stone, Bellows, and Bostwick, against Pilcher, Drips, Carson, Woods, C. S. Hempstead, and Mary Lisa; the last, as executor and executrix of the last will of Manuel Lisa. The defendants all pleaded non-assumpsit. The Court, sitting as a jury, found, that Hempstead and Lisa did not assume in manner and form, &c., and that the other defendants did assume, &c. The declaration charges a joint contract. The Court gave judgment for the plaintiffs against those defendants who did assume, and for those defendants who did not assume.

*Absent, Wash, J.

A writ of error is brought by those defendants who did assume. The error assigned, is, that in this case, the declaration shows and alledges a joint contract, and that some of the defendants having had a verdict for them, there should have been judgment for all. To prove that this judgment is erroneous, 1 *Chity's pleading* 31, (66) is cited, where it is said, that in actions *ex-contractu*, against several, it must appear on the face of the pleadings, that their contract was joint, and that fact must also be proved on the face of the trial, and if too many persons be made defendants, and the objection appears on the pleadings, either of the defendants may demur, move in arrest of judgment, or support a writ of error; but if the objection does not appear on the pleadings, the defendants may move for a non-suit.

To escape the consequences of this doctrine, the defendants in error insist, that the verdict and judgment are no part of the pleadings; therefore, the objection cannot be looked into, and the defendants having failed to take advantage by non-suit, cannot now have any advantage.

I answer to this argument, that the objection is equally fatal, whether the error appear by the declaration, plea, verdict or judgment, if it be one which this Court can see the Court below expressly decided on. It is there argued, that this judgment and record does not show that the point was ever decided on in the Court below, and that the party should have moved in arrest of judgment. The act of the General Assembly, *Revised Code*, p. 634, says, no exception shall be taken in the Supreme Court, on any point, except that which has been expressly decided in the Circuit Court. This Court has on several occasions held, that if there be an error in the judgment, in departing from the pleadings or verdict, that, though no objection be made, we will hold that it was an express decision; as if the action be in covenant, and the judgment be in debt.

It is next insisted, that a discharge under a bankrupt law may have discharged these parties: but there can be nothing in this, because, I understand that these matters must be pleaded by the defendant, so that in this case, it could not have been legal testimony. It is also insisted, that a former recovery against Hempstead and Lisa, might have taken place, and might be given in evidence under the plea of non-assumpsit, and if it could by law have taken place, then we will suppose it was proved.

It is true that a former recovery may be given in evidence on non-assumpsit, but that being true, by no means disposes of the question, what shall be done where a recovery is had against some of the joint promissors, and afterwards they and all the joint promissors are sued? To prove that no joint action can afterwards be brought, the case of Robertson *v.* Smith et al, 18 *John's Reports*, is cited. This case is the most satisfactory on the point that we have been able to find. It seems to corres- (67) pond with other principles of law.

The declaration must alledge that all promised, and that must be proved, and the promise must be a legal one at the time it was made, and it must be owing at the time of bringing the action; for if one has paid, a recovery can be had against none, and I see no objection in the decision in 18 *John's R.*, which decides that if the joint contract has been extinguished by a judgment against two, that as a joint contract it is gone at law against all.

The judgment is reversed.

STATE *v.* STEIN.

The act of the General Assembly, passed 19th February, 1825, which gives Justices of the Peace jurisdiction, in cases of breaches of the peace—held, to be repugnant to the Constitution of the United States and this State. (Note *a*.)

IN ERROR.

TOMPKINS, J., delivered the opinion of the Court.

Stein was indicted for an assault and battery in the Circuit Court of Jefferson county. He pleaded a former acquittal of the same offence before a Justice of the Peace; to this plea there was a demurrer which was overruled by the Circuit Court, and to reverse the judgment of the Circuit Court this writ was sued out. By an act of the Assembly, passed the 19th February, 1825, jurisdiction in cases of breaches of the peace was allowed to Justices of the Peace, and the accused might be tried and convicted without a previous indictment by a grand jury. The fifth article of the amendments to the Constitution of the United States, provides, among other things, that no person shall be deprived of life, liberty, or property, without due process of law: and the State Constitution, art. 13, sec. 9, declares that the accused cannot be deprived of life, liberty or property, but by the judgment of his peers, or the law of the land. Mr. Kent, in his commentaries on American law, says, that the right of personal security is guarded by provisions which have been transcribed into the Constitutions of this country from Magna Charta, and other fundamental acts of the English Parliament. We must then examine and find out the meaning given by the English Courts and sages of the law to the terms used in Magna Charta, (68) and those other fundamental acts of the English Parliament, in order to ascertain the intention of the framers of the Constitution of the United States and of this State. The same author adds, page 9th of 2d vol. of his commentaries: "It may be received as a self evident proposition, universally understood and acknowledged throughout this country, that no person can be taken, or imprisoned, or disseized of his freehold or liberties, or estate, or exhiled or condemned, or deprived of life, liberty or property, unless *by the law of the land or the judgment of his peers.*" The words, "by the law of the land or the judgment of his peers," are the very words used by the framers of our State Constitution. Let us see then what is their signification in the country from which we have borrowed them. Mr. Kent continues, "the words, *by the law of the land,*" as used in Magna Charta in reference to this subject, are understood to mean due process of law; that is, by indictment or presentment of good and lawful men. And this, says Lord Coke, is the true sense and exposition of these words." Mr. Kent says, "that the Constitution of the United States, and the Constitution of almost every State in the Union, contain the same declarations in substance, and nearly in the same language; and we have seen that he concludes by stating it as a self evident proposition, that no man in these States can be deprived of liberty or property, but by the law of the land or the judgment of his peers; that is, by indictment or presentment of good and lawful men, a grand jury.

This privilege is secured by the Constitution of the United States. But the framers of our State Constitution, not content with the provisions of the Constitution of the United States, have used terms more explicit than those used in the Constitution of the United States, and they have used language, too, in expressing their intentions, which is clearly and correctly understood. But it is provided in the statute, that the accused may, if he chooses, be indicted and tried in the Circuit Court, and that if tried before a Justice of the Peace under the statute, it must be by consent. To this it may be answered, that, where the Constitution has denied jurisdiction, his consent cannot give it. It is the opinion of the Court, that the act giving such jurisdiction to Justices of the Peace, is inconsistent with the privileges secured by the Constitution of this State to the citizen, and that it is therefore so far void, as its provisions are inconsistent with the Constitution.

The judgment of the Circuit Court is reversed.

N. B. The bar would not argue this case: for the authorities cited, the Court is (69) indebted to Mr. Hunt, Circuit Attorney of 2d Judicial Circuit.

(*a*.) See The State *v*. Ledford, 3 Mo. R., p. 102.

BENNETT *v*. O'FALLON, EX'R. OF STOKES.

1. After a decree for alimony, the husband is not chargeable for debts contracted by the wife.
2. Persons dealing with a married woman, who lives separate and apart from her husband, do so at their peril.

ERROR from the St. Louis Circuit Court.

WASH, J., delivered the opinion of the Court.

This was an action of assumpsit brought by Bennett against the defendant as executor of Stokes, to recover the value of goods sold to the wife of Stokes, and for her board and lodging. The bill of exceptions states that it was proved on the part of the plaintiff that Marianne Stokes was the lawful wife of said testator. That said testator came to the Territory of Missouri in the year 1819: that his wife came to to the State of Missouri early in the year 1821: that said testator, on her arrival, refused to acknowledge her as his wife, and denied her all means of support: that said plaintiff furnished her with board and lodgings for three months in said year, ending on the 25th of September: that afterwards, on the 21st October, in said year, said plaintiff sold to her a variety of household articles, amounting to the sum of two

hundred and sixty-five dollars: which articles were not delivered until the month of November following.

Upon the part of the defendant, it was proved, that in the year 1821, said Marianne brought suit against her husband for a divorce *a mensa et thoro*, and such proceedings were therein had, that on the 9th day of October, in the year 1821, it was decreed by the Circuit Court of the county of St. Louis, that said testator should pay to the said Marianne, the sum of eight hundred dollars per annum during the pending of said suit, to be paid in quarterly instalments of $200 each, the first instalment to be paid on the 1st day of November then next following, which was paid.

Upon this state of facts, the cause was submitted to the Court setting as a jury, who gave judgment for the sum of fifty-two dollars eighty-seven and a half cents, the (70) amount of boarding furnished to said Marianne; and as to the other sum of two hundred and sixty-five dollars, the Court did declare its opinion to be that the articles furnished by the plaintiff to the wife of Stokes were necessaries, but that in consequence of the decree for alimony aforesaid, the said testator was not liable therefor. To reverse this judgment, the plaintiff now prosecutes his present writ. The only question raised, is, whether the executor of Stokes is liable for the articles sold by Bennett to his (Stokes') wife. For the plaintiff it has been urged, that Stokes' wife had as much right to charge her husband for necessaries, after the decree, and before the payment of the instalment, as before the decree.

That the wife was not liable, (see 5 *Term Rep.*, 679,) and unless the plaintiff could make the husband pay, (in such a case,) he would be without remedy. The case in 11 *Johns. Rep.*, 281, M'Cuthen *v.* M'Gahay, is a full answer to this argument, and lays down the law correctly.

A person who deals with a married woman living separate from her husband, is bound to make inquiries and ascertain whether, under the circumstances, her husband will be chargeable for the articles furnished. He gives her credit at his peril. The very object of the decree for alimony, is to furnish the wife with necessaries, and the Court will take care that it be made effectual for that object, and suited to the condition of the parties.

By the decree, the husband is charged directly with the due maintenance of his wife; to make him responsible to persons with whom she might afterwards deal, would be to charge him indirectly for the same object.

The judgment below must be affirmed with costs.

Decisions of the Supreme Court of Missouri,

ST. LOUIS DISTRICT, MAY TERM, 1828.

Marguerite v. Chouteau.

Indians taken captive in war, prior to the year 1769, by the French, and held or sold as slaves, in the province of Louisiana, while the same was held by the French—held to be lawful slaves; and if females, their descendants likewise. (Note a.)

IN ERROR from the St. Louis Circuit Court.

Opinion of Tompkins, J.*

This is an action of trespass, assault and battery, and false imprisonment, brought by the appellant against the appellee, to recover her freedom.

On the trial, the following facts appeared in evidence: Madame Chauvin deposed, that Marguerite, the plaintiff, appellant here, was born in the year 1778; that the name of her mother was Marie Jean, sometimes called Marie Scipion, who belonged to and lived with Joseph Tayon, the deponent's father; that the mother of the appellant was in possession of deponent's father from the time of his marriage until January, 1801, when she was removed sick from the house of Mr. Chouteau (where Tayon then lived) to the deponent's house, where she died in June, 1802, aged about 60 years; that the deponent had heard from her father and mother, that Marie Scipion was bought by deponent's grand mother, and given to her mother; that she had heard from the same, that Marie Scipion was the daughter of an Indian woman captured by the French near Natchez, and brought to Fort Chartres, where she was sold as a slave; that a negro man named Scipion was supposed to be the father of Marie Scipion; that the deponent has heard this from others than her father and mother; (72) that the deponent's father had an Indian woman named Marie Louise, who had

*Absent, Judge M'Girk.

two male children, Akin and Julien, who ran away and passed for freemen at the commencement of the Spanish Government; that they went to New Orleans after the publication of an ordinance of O'Reilly, the Spanish Governor of Louisiana, "declaring all the Indian slaves, then in the province of Louisiana, free at the death of their master, and those born after the publication, free at their birth, prohibiting any sales by any persons then in possession of such slaves; that the deponent read the ordidance to her father, and conversed with him on the risk he ran of losing his Indian slaves, and that she remembers he sold one of these slaves, and was compelled to take it back and hush it up, lest he should be fined under the ordinance; that she remembered to have heard her father say, after the publication of the ordinance, that Marie Scipion and her children would be free at his death, in consequence of that ordinance.

Jean B. Reviere's deposition contained about the same account of the descent of Marie Scipion. He knew her at Fort Chartres, when she was about 18 or 20 years old; had heard his deceased father say, that the mother of Marie Scipion was of the Natchez tribe of Indians; that he had heard Joseph Tayon, in his life time say, that Marie Scipion was given to him by one Guyon, on condition that she and her children should be free at the time of the death of Tayon and wife. This witness also speaks of the publication of O'Reilly's proclamation, with this difference, that it was thereby declared that all Indians then held in slavery, should be forthwith set at liberty, and be allowed to remain in the settlements, or to return to their own country, at their own option; he further states, that many Indians, then held in slavery, were set at liberty, in pursuance of this proclamation. He also deposes, that two sons of Marie Louise left the service of Joseph Tayon, and went to the lower country. He also states, that he understood Joseph Tayon to say, that Marie Scipion lived in his family of her own free will and consent, because she was well treated and chose to remain with him, and that the said Marie Scipion and her children were at liberty to leave him at any time they pleased, but if they chose to remain till his death, they should never serve any body.

The deposition of Marguerite Reviere states, that Marie Scipion was descended from an Indian woman of the Natchez tribe; that it was the public opinion that she and her children could not be slaves, being of Indian blood. She also testifies as to the publication of O'Reilly's proclamation, and says, that Indians before held in slavery, were immediately set free.

(73) Francis Dorlac's deposition gives the same account of Marie Scipion's descent; mentions the publication of O'Reilly's proclamation in terms equivalent to those used by the two last witnesses; that slaves of several persons were set at liberty under that proclamation, immediately after its publication.

Several other witnesses were examined, who told nothing more than had before been given in evidence.

John B. C. Lucas, a witness examined by the plaintiff, testified, that about twenty years ago, the witness being then a Judge of the Superior Court of the Territory of Missouri, there was a suit in that Court betwixt the children of Marie Scipion and Joseph Tayon, that the present plaintiff Marguerite was probably one of the parties; that in this suit, the pedigree of the defendants in that Court, came directly in question. The question then was, whether the then defendants and others were descended in the maternal line from an Indian woman. The witness then heard Antoine Reviere state, that Marie Scipion's mother was an Indian woman of the Natchez tribe;

that she was brought to Fort Chartres after the defeat of the Natchez Indians by the French, about the time of the massacre as it was called; that the father of Marie Scipion was a negro man; that when the mother of Marie Scipion was brought to Fort Chartres, he was a very young man, too young to go to hunt or to war; that Pierre O. Becket, another witness then examined, gave a similar account of the descent of Marie Scipion, and that he saw her in the situation of a servant in the kitchen of Mr. Tayon, but knew nothing of her freedom or slavery. Madame Cochon, a witness, who testified on that trial on the part of Tayon, stated, that Marie Scipion was the daughter of a negro woman.

Objections were made by the defendant in the Circuit Court (appellee here) to reading to the jury those parts of depositions of Madame Chauvin, of Jean B. Reviere and of Dodier, which relate to the publication of O'Reilly's proclamation, and they were sustained by the Court.

The following is so much of the defendant's testimony, as I think material to be noticed. Sebastian Pratte deposed, that in 1756, or 1757, he went to Fort Chartres in Illinois, and lived in the family of Joseph Tayon, above mentioned: that in the first year of his residence with Tayon, he observed in the family a negro woman named Mary, an Indian woman called Marie Louise with her two children, and a girl called Scipion, about ten or twelve years of age, treated and well known as a slave; that he (74) knew her in Tayon's possession for several years after his removal to St. Louis; that he did not know the mother of Scipion; that there were at Fort Chartres, and elsewhere through the country, a great many Indian slaves and but few blacks; that the Indians were universally acknowledged as slaves, and frequently sold as such before the Governor; that he himself sold one to the Commandant; that the Commandant he speaks of, was the English Commandant at Kaskaskia; that from his belief of the character of Mr. Tayon, he is certain he would not have sold a person as a slave who was not so; that a majority of the Indians held as slaves, were brought down the Missouri by the traders, and were of different nations; that there were many Indian slaves in St. Louis after its first establishment, and but few blacks.

The counsel for the plaintiff objected to the reading of those parts of the deposition which relate to the existence of Indian slavery in Illinois and Louisiana, and to the number of Indian and black slaves; which objection was also overruled by the Court.

The deposition of Auguste Chouteau stated, that the deponent had long known Marie Scipion; always understood her to be the daughter of a negro woman, slave to Mr. Guyon, which Mr. Guyon gave to his relation; that "at the arrival of the Spanish Government" he heard there were many slaves of Indian blood, and *after* ("*often*") of the mother's side.

The plaintiff objected to reading such parts of said deposition as relates to the number of Indian slaves in the country, and to the giving of Marie Scipion to Tayon, by Guyon, and the Court overruled the objection.

The deposition of Madame Dubrieul stated, that Marie Scipion was of negro blood; that she was the mother of Marguerite; and that she knew an old Indian woman named Marie Louise, who remained a slave to Tayon till the Spanish Government declared her free; that many Indian slaves remained with their masters after they were so declared. Two other depositions read by the defendant in the Circuit Court contain no new matter.

The plaintiff then prayed the Court to instruct the jury,

First. That if the jury find from the evidence that the ancestor of the plaintiff, in the maternal line, was an Indian woman, they must find for the plaintiff.

Second. That if the maternal ancestor of the plaintiff was taken as a prisoner in war, she did not thereby become a slave.

(75) That heresay evidence is not competent to prove the fact, that the maternal ancestor of the plaintiff was taken a prisoner of war.

Fourth. That evidence of maternal ancestor of the plaintiff being held as a slave during the French Government of Louisiana, does not establish the legality of the slavery in which the plaintiff may be held.

Fifth. That no practice of enslaving Indians during the time that Louisiana belonged to the French, is evidence that such practice was sanctioned by law.

Sixth. That a prisoner of war cannot be reduced to slavery, unless under such circumstances as would authorize putting him to death, and that unless evidence of such circumstances is given to the jury, they must consider such slavery, under the pretence of the ancestor of the plaintiff being taken a prisoner in war, as illegal.

Seventh. That the right to hold a prisoner of war in slavery continues no longer than the political necessity exists for such enslaving, and that when such necessity ceases, the prisoner can no longer be held in slavery.

All of which instructions the Court refused to give.

The defendant then asked of the Court the following instructions:

First. If the jury find from the evidence that the maternal grand mother of the plaintiff was an Indian woman of the Natchez nation, taken captive in war by the French, and that she was held *and sold* as a slave in the province of Louisiana while the same was held by the French, and prior to the year 1769—she and her descendants ought to be considered as being lawful slaves.

Second. If the jury find from the evidence that the maternal grand mother of the plaintiff was an Indian woman taken captive in war by the French, and was held *or sold* as a slave in the province of Louisiana while the same was held by the French, and prior to the year 1769, she and her descendants ought to be considered by the jury as being lawfully slaves.

Third. If the jury find from the evidence that the maternal grand mother of the plaintiff was an Indian woman taken captive in war by the French, and was held and sold as a slave in the province of Louisiana while the same was held by the French, and prior to the year 1769, she and her descendants ought to be deemed by the jury as being lawfully slaves.

Fourth. If the jury find from the evidence that the maternal grand mother of the (76) plaintiff was an Indian woman taken captive in war, and held as a slave in the province of Louisiana while the same was held by the French, and prior to the year 1769, she and her descendants ought to be taken by the jury to have been lawfully slaves.

Fifth. If the jury find from the evidence that the maternal grand mother of the plaintiff was a negro or Indian woman, and that she was held as a slave in the province of Louisiana while the same was held by the French, and prior to the year 1769, she and her descendants ought to be taken by the jury to have been lawfully slaves.

Sixth. That the declaration of Joseph Tayon, as testified to by John B. Reviere in his deposition, do not, in law, operate to emancipate said Marie Scipion

or any of her children, *nor is the plaintiff entitled to her freedom in consequence of said declarations.*

Seventh. That Indians taken in war *might lawfully be held as slaves* in the province of Louisiana *while the same was held by the French*, and prior to the year 1769.

Eighth. That Indians might lawfully be reduced to, and held in slavery in the province of Louisiana while the same was held by the French, and prior to the year 1769.

All of which instructions the Court gave.

It is assigned for error: First. That the Circuit Court refused to give each and all of the instructions prayed for by said Marguerite. Second. That the Circuit Court gave the jury each and all of the instructions asked for by Chouteau. Third. That the Circuit Court rejected the evidence of O'Reilly's proclamation contained in the deposition of Madame Chauvin and others. Fourth. That the Circuit Court admitted the evidence contained in the deposition of Pratte of many Indians being held in slavery in Louisiana, and admitted other evidence objected to by said Marguerite.

On the part of the plaintiff it is contended, first, that all Indians unquestionably are at least *prima facie* free, and 1 *Wash.* 123; 1 *Hen. & Mun.* 133; and 2 *Hen. & Mun.* 157; and Vaughan *v.* Phebe, a Tennessee case, are relied on.

Raynal, Brackenridge, and Marshall's life of Washington, are cited, to show that the French Government treated with the Indian nations bordering on their colonies in North America as independent nations, contending that they stood in the same relation to the French colonies, that the neighboring tribes did to the British colonies; while on the other hand, all negroes imported into North America were brought in as slaves; thence it is concluded, that in Louisiana, as in the late British colonies, negroes ought to be held *prima facie* slaves, and Indians *prima facie* free.

(77) If Indians were only *prima facie* free under the French Government in Louisiana, then it is contended that hearsay evidence is not sufficient to prove that the plaintiff's maternal ancestor was taken a prisoner of war; 7 *Cranch* 290, is relied on.

Third. It is contended that even though it were proved that the plaintiff was a prisoner of war, yet still, as the French regarded Indians as independant nations, the law of nations applies to them, and that they could not, agreeably to that law, be held in slavery no longer than the necessity for so holding them existed; Vattel is cited—the pages of Vattel and Raynal referred to, contain no such matter in the editions which have fallen into my hands.

Mr. Spalding, on the part of the appellee, contends—

First. That slavery of Indians was legal under the French Government of Louisiana, because, first, there is no distinction naturally between ("nations" perhaps,) to entitle some to the exemption from the possibility of being made slaves, and in all or most of the English colonies in early times, the same state of facts as has appeared in this case, would, had it existed with respect to an African, have unquestionably held him in slavery. If, in those colonies, the fact that negroes were held as slaves, and bought and sold as such in the absence of all written law, was considered as proof of the law, as it seems to have been held, why should not the same principle apply to Indians? and he cites 3 *Martin* 285; 1 *Tucker's Bl.* 2d part, app. 45, and 1 *Dallas* 167.

Second. The fact, he continues, whether slavery of negroes or Indians existed lawfully in French Louisiana does not depend on the consent of many nations to make slaves of them; it depends on the municipal law of that province. That law can-

not be presumed to have been written, for slavery has not any where commenced by written law. Whether Indians were slaves by law, therefore, is to be gathered from facts and circumstances, decisions of Courts, &c. Indians were generally held as slaves in Louisiana, and treated as such. A whole tribe, to-wit: the Natchez, were captured and held and sold as slaves. There were a great many Indian slaves at the time the Spanish authorities took possession of the country. In the margin here are cited the depositions: History of Louisiana by Le Page Du Pratz, 258, 326; Raynal's Indies, vol. 8, 143.

Third. The proclamation of O'Reilly, meaning the proclamation made in 1769, forbidding Indians to be held in slavery for the future, became a law of the land, and strongly fixes the legality of Indian slavery. The Court being bound *ex-officio* to (78) know the law of the land, will inform itself whether such proclamation ever existed, what was its tenor, &c.; and it has a right to look into the excluded parts of the depositions in this case, where will be found ample proof of the promulgation of the proclamation, the tenor of which has, however, been misconceived by the witnesses, through ignorance and length of time. As evidence of the unwritten law of the land upon the subject of Indian slavery, the cases cited in *Martin's Reports* of the decisions of the Baron de Carondelet have great weight, being the judicial decisions of the highest authority in the province.

Fourth. If Indian slavery was legal under the French Government of Louisiana, the presumption unquestionably arises *now* as it did then, that an Indian whose maternal ancestor has been held as a slave till death, is a slave; he here cites from 3 *Martin*, in the case of Seville *v.* Chretien, in which the Court decided that the freedom of Indians held in slavery under the French Government in Louisiana, was not acquired under the Spanish Government, and that Indian slavery was lawful under the French Government there. The counsel for the appellee then contends that those parts of the plaintiff's deposition which relate to the publication, contents and effects of O'Reilly's proclamation, were properly excluded from the jury by the Circuit Court, that no foundation was laid for the admission of parol evidence to prove the contents of a written instrument. Furthermore, that the proclamation, if such an one had ever been made, became the law, and the Courts of this State are bound *ex-officio* to know its contents and meaning; and it was ("not") competent to prove by witnesses to the jury what the Court was bound to know, and to declare to them judicially as a part of the law of the case and of the country at a former period. But the record states that those declarations were excluded which relate to, or speak of, or concerning the publication, contents and effects of a proclamation, &c. Now the effects of the law (for that proclamation was law) cannot be adduced to prove to a jury what that law was, particularly where it was written law, and was not produced; but he contends that the plaintiff's objections to the depositions of Pratte and Chouteau, before mentioned, were not good, "because the existence *de facto* of Indian slavery, and its extent in Louisiana, is evidence in this case for the purpose of showing the strength of the presumption to be raised against the freedom of Marguerite. The more Indians there were legally held in slavery, the greater the probability that Marguerite's ancestor was one of them. Again the defendant had (79) the same right to read this part of said depositions, that he had to read an authority in law to the jury. The sixth instruction asked by the defendant and given by the Court, raises the question whether the verbal declaration of the owner of a slave could emancipate such slave under the Spanish Government." The *Partidas*

is cited to show that emancipation was required to be performed in a more ceremonious way than by our laws at present. The points arising in this case, and which seem to me necessary to be decided on, are:

First. Whether the Court erred in rejecting the evidence of the publication, contents and effects of the proclamation of O'Reilly, the Spanish Governor, as testified by the appellant's witnesses.

Second. Whether the Court erred in permitting to go to the jury, those parts of the depositions of Sebastian Pratte and Auguste Chouteau, that mention the number of Indian slaves held in Illinois and Louisiana, and of such parts of the deposition of said Pratte as mention the number of Negroes in said country, and of the sale of Indian slaves.

Third. Whether the Court erred in permitting to go to the jury, that part of the deposition of Auguste Chouteau which mentions that he had heard that Marie Scipion was a gift from Guyon to Tayon.

Fourth. Whether Indians might be lawfully reduced to slavery under the French Government of Louisiana.

Fifth. Whether Indians of the Natchez tribe might lawfully be reduced to slavery under the French Government of Louisiana.

Sixth. Whether the declarations of Tayon, as testified to by J. B. Reviere, operate to emancipate Marie Scipion.

Seventh. Whether, under the French Government in Louisiana, negroes might lawfully be held in slavery.

First. The evidence of the publication, contents and effects of O'Reilly's proclamation, was, I think, properly rejected. If we consider it as a matter of fact, no foundation, as was observed, has been laid for proving the contents of a written instrument. If we regard it as law, it was not a subject matter, proper to be contained in a deposition, for the ears of a jury.

Second. The evidence of Pratte and Chouteau, concerning the existence and extent of Indian slavery in Louisiana, regarded as a matter of fact, was, I think, wholly immaterial; the issue here is, whether Marguerite be free or a slave; she cannot be supposed to be prepared to contend whether other Indians were lawfully held in (80) slavery, and her case is not to be prejudiced by theirs. But it is contended that the defendant has the same right to read this part of the depositions, that he had to read an authority in law to the jury. Now the existence and extent of Indian slavery (if that slavery were lawful) would rather be the effect of *the law* than the law itself; and the defendant's counsel has before said that the *effects of the law* cannot be adduced to prove to a jury what the law is, particularly when it is a written law. I am at a loss to see why the law, whether written or unwritten, comes before the jury in the form of a deposition. *Blackstone*, in the first volume of his Commentaries, page 63, says, "with us, at present, the monuments and evidences of our legal customs are contained in the records of the several Courts of justice, in books of reports and judicial decisions, and in the treatises of learned sages of the profession, preserved and handed down to us from the highest times of antiquity."

In all civilized countries, Courts, I think, ought to require that the person who tells them of the existence of a law, should be in a situation in life to know what is the law. It is not pretended that the witnesses were learned sages of the law, and if they had been such, the course I think would have been to introduce them into Court, to prove the law to the Court and not to the jury. But it is evident the ob-

ject of the appellee is to induce the Court to presume a law from the existence of certain facts, and with these facts, in my opinion, the jury have nothing to do; therefore, I think, the testimony should have been rejected.

Third. Whether Marie Scipion were given by Guyon, if material in this case, ought to have been proved by other evidence than hearsay.

Fourth. In order to establish this point, the appellee contends that there is naturally no distinction among the nations of the world, to entitle some to exemption from the possibility of being made slaves, and that in all or most of the English colonies, in early times, the same state of facts as has appeared in this case in relation to an Indian, would, had it existed with respect to an African, have unquestionably held him in slavery. If in these colonies, he continues, the fact that negroes were held as slaves, and bought and sold as such, in the absence of all written law, was considered as a proof of the law, why should not the same principle apply to Indians. Here he cites *Martin's Reports*, vol. 3, p. 285; 1st vol. *Tucker's Bl.* p. 2d, page 45 and 46 of the app.; 1 *Dallas*, 167. *Judge Tucker*, in the 45th page cited, says that negroes were first introduced in Virginia in 1620; in the 46th, (81) that an act was passed prohibiting Indians or negroes manumitted, &c., from purchasing Christian slaves. From this act, he says, it is evident that Indians had before that time been made slaves, as well as negroes, though we have no traces of the original act by which they were reduced to that condition; strongly insinuating, I think, rather that the act was lost than that none had ever been passed. In Virginia, where a statute authorizing the reducing of Indians to slavery existed, still Indians were *prima facie* free, and negroes were *prima facie* slaves: see 1 *Hen. & Mun.* 133, Hudgins *v.* Wrights. For this distinction there is a very good reason. Negroes were imported into Virginia and sold as slaves, under the authority of the Crown of England, from a very early period till the year 1778, at which time Virginia became independent. The enslaving of Indians was authorized but for a very short time, and the Courts required the persons claiming property in an Indian, to prove that such Indian was enslaved agreeably to law. The same author quoted by the appellee, tells us in a few pages after, that "it is easy to trace the desire of the Legislature to put a stop to the further importation of slaves, and had not this desire been uniformly opposed on the part of the Crown, it is highly probable that event would have taken effect at a much earlier period than it did." The Portuguese, the Spaniards, the Hollanders, the English, the French, and Danes, all carried on the slave trade in Africa. For this purpose their respective governments established military posts and incorporated companies: see *Raynal*, book 11, chap. 20; and yet we are told there is no legislative act to authorize negro slavery. It might be asked whether any legislative act were necessary to authorize the sovereign power of a State to do any act it pleases. The King of France, at least, could not think it necessary to make a law to authorize himself to carry on the slave trade; for this he literally did by incorporating companies to do so, inasmuch as the company was his agent, supported by his arms. *Raynal* says, "L'etablissement qu'ills formerent a cette epoque dans le Senegal, dut en 1678 quelqu' accraisement a la terreur qu' imprimaient alors les armes victorieuses de Louis XIV; (the establishment about that time made in Senegal, owed something in 1678 to the terror then impressed by the victorious arms of Louis XIV.) We have the authority of Judge Tucker, that the Assembly of Virginia was restrained by the Crown of England from prohibiting the

(82) importation of African slaves. What power then could be expected to resist the King of France in Louisiana?

It is in my opinion quite immaterial whether the subjects of the European powers first began to trade in slaves to Africa, and were afterwards supported by their respective sovereigns, or whether the sovereigns first authorized the trade. The assent of the government is clearly given to the African slave trade, while no such commerce in Indian slaves is authorized by any act of theirs. The implied assent relied on by the appellee, amounts to nothing; as well might it be pretended one hundred years hence, that murder was at this present time lawful in Missouri, because some persons had killed others, and had not been punished for the act. Governments do not impliedly assent to a violation of the laws of nature. We know the laws of a polished nation, such as France, from her statutes, the decisions of her Courts of Justice, and the acts of the Executive power. But the French Government, we are told, sent three hundred Indians of the Natchez tribe, as slaves, into St. Domingo. This only proves the will of the French Government to enslave those three hundred Indians; and the fact of their being sent off the continent, appears to me to be strong evidence that the Government never had been accustomed to enslave Indians in the province of Louisiana.

Du Pratz tells us that the Natchez had been very useful and friendly to the French. The author himself had lived at the post, and gives a very particular account of the war and capture of that tibe. Chepart, he tells us, had been removed from the command of the post, for acts of injustice done by him. Perier arriving at New Orleans shortly after, as Commandant General of Louisiana, suffered himself to be imposed on by Chepart's plausible manners, and restored him to his command, which, says the author, never would have been done had Perier known him well, "L'integrete de ce commandant general lui aurait ete un obstacle insurmountable." Chepart, restored to his post, commenced a new course of oppression and tyranny. The Natchez, driven to desperation, determined to exterminate the French; very few of those at the post escaped being either made prisoners or butchered. Many other outrages were committed. The French under Loubois, marched against them and beseiged them in their town; the Natchez, hard pressed, sought and obtained conditions: they surrendered the prisoners they had made, and in the night made their escape and recommenced hostilities in the most outrageous manner. The author observes that the (83) Natchez at the time of their escape, had good reason to fear the French on account of the black act they had done, but that they feared still more the Chatkas; they did not doubt that the French would excuse them for the murder of their countrymen, in consideration of the tyranny of the French commandant: but they feared the accustomed insolence of the Chatkas, who would have stripped them naked, and insulted them even in the presence of the French. And it was certainly this fear which determined them to escape during the night. Some time after, Perier marched in person against them and beseiged them. The Natchez again demanded a capitulation; but they started difficulties, which occasioned messages to be sent ("des allees et des venues,") till night, which they waited to profit by it, by demanding till the next day to draw up the articles of capitulation. The night was allowed them; but they were so watched that they could not escape, as in the war of Loubois; they, however, made the attempt, but failed, a small number escaped and retired to the Tchickachas. The rest surrendered at discretion. They were sent to the Island of St. Domingo, says the author, that the nation might be extinct in the colony. From

this account of this affair, taken from the author cited by the appellee, I am inclined to think that the French considered themselves justified by the circumstances of the case, in reducing the Natchez to slavery. It was evidently a war of extermination on the part of the Natchez. The allied powers of Europe lately confined Napoleon to the Island of St. Helena, because he was, as they affected to believe, dangerous to their government, and yet it never was contended that each Englishman had a right to imprison in his own house a Frenchman, because his government had concurred in imprisoning the Emperor of the French, in St. Helena.

We may further observe, that Perier did not seem inclined to treat them with so much harshness, till they had again made an attempt to escape, after asking and obtaining a capitulation. For such conduct as that of the Natchez towards the French, a civilized nation might, perhaps, in modern times, have been refused quarter. *Vattel* says, B. 3, Cap. 8, sec. 152, that prisoners of war may be made slaves in cases which give a right to kill them. "But this disgrace of mankind," he afterwards adds, "is happily extinct in Europe." Another page of Du Pratz was referred to, erroneously I suppose, as the author says nothing there, or in any other part of that (84) volume, about Indians enslaved by the French. This book is rarely found, and the other volumes have not been within my power.

I cannot notice the passage referred to in Raynal, because the edition used by the counsel has not been given to me, and that in my possession must be differently paged. I have carefully read over Raynal's account of the establishment of the French on the continent of North America, and have been able to find nothing to justify a belief, that the French Government ever reduced Indians to slavery, either in Canada or in Louisiana. In chap. 8, of book 15, the author gives the account of the capture of the Iroquois chiefs, and speaks of it in these terms. "Denonville (Governor of Canada,) dishonera le nom Francois chez les savages par une infame perfidie." (Denonville dishonored the French name by an infamous perfidy.) The Chiefs were sent to the galleys, but we are not told by the author any more about them; they were probably restored to their country, for soon after we find Denonville constrained to beg a peace of the Iroquois, and using as a mediator the same person, (L'Ambreville, the jesuit missionary to the Iroquois,) whom he had before used as the unconscious instrument, to decoy the unsuspecting chiefs to the pretended conference where they were captured. Had a French officer commanding a post on the African coast, established to carry on the slave trade, decoyed in this manner the chiefs of a tribe of negroes, and after capturing them, sent them as slaves to be sold in the French W. I. Islands, the author would hardly have told us that the French name had been dishonored amongst the negroes by an infamous perfidy, inasmuch as he would in such case have done nothing more, than what the companies incorporated and supported by his country were doing whenever they had the power. But did I want any thing to confirm me in the opinion, that the French Government never tolerated Indian slavery in Louisiana, I would resort to the proclamation of O'Reilly so much relied on by the appellee, and I would suppose, too, with the counsel, "that its tenor had been misconceived by the witnesses through ignorance and length of time." In the copy of the reported case furnished me, I find these words: "Governor O'Reilly, 1769, on taking possession of the colony, discovered that a considerable number of Indians were held in slavery by the French colonists. This he declared by a proclamation to be contrary to the wise and pious laws of Spain, but by

(85) the same instrument he confirmed the inhabitants in the possession of such Indian slaves, until the pleasure of the King in this respect could be known."

"Here," says the report, "is then a recognition of the rights of possessors to hold their Indian slaves, until the legislative will of the monarch should deprive them of it." We are given here not an extract, but the import of this proclamation. In the same reported case we are told, that "it is a principle of the law of nations, that in cases of the cession of any part of the dominions of one sovereign power to another, the inhabitants of the part ceded, retain their municipal regulations until they are abrogated by some act of the new sovereign." This principle of the law of nations, then, is adopted by the laws of all civilized nations, and becomes a part (we may say) of their municipal law. Even charity would induce us to believe that O'Reilly knew this, and consequently, also, that he must have been able to draw this conclusion, that if by the laws of France, previous to 1769, a subject of France residing in the province of Louisiana, had a right to hold Indians in slavery, he had also, after the year 1769, under the Government of Spain, a right to hold his Indian slave under this principle of the law of nations; and that this being no violation of the wise and pious laws of Spain, the inhabitants stood in no need of O'Reilly's permission to hold their Indian slaves. I conclude, then, that O'Reilly well knew that by the laws of France, Indians were not allowed to be reduced to slavery in Louisiana; thence, under the Spanish rule, the subject holding an Indian slave was said to do an act contrary to the laws of Spain. This proclamation, we are told, is a law; I do not understand that O'Reilly had power to make laws, and he certainly does not here pretend to make one, he only pretends to suspend the effects of a law, and this is called a recognition of the right of the possessors to hold their Indian slaves, until the legislative will of the monarch should deprive them of it; this (it is said) never did happen: I say it had already happened. The law is the will and only known will of the King of Spain; at all events, the Courts of this State now succeed to those of Spain, and if O'Reilly had the power, (which I by no means concede,) to suspend the effects of a law, that law is now revived. If the party had rights under the French Government, those rights continue under each change of government, and he can now prosecute them as he could have done under the French Government. "In conformity with O'Reilly's opinion," we are told, "is a decree of the Baron de Carondelet, twenty-five years after, by which he ordered two Indians, (86) Alexis and David, to return to and abide with their owners, until the royal will was expressed to the contrary." These are not decisions, they are denials of justice for which there might have been political reasons to excuse before his superior, an officer vested with the supreme executive and judicial power of the province. To give this decision, or rather this order of Carondelet, the character of a judgment, he ought to have said whether the Indians were slaves or not; then they would have been entitled to their appeal to the supreme judicial power; it might further be added that even the Natchez, so jealous of their liberty, never once complained that the French made personal slaves of them. Political slavery was all they dreaded. When the Sun of the White Apple assembled his council, to deliberate on the means of delivering themselves from Chepart's tyranny, one of the ancient chiefs, in a speech of some length, enumerated the evils they had suffered from the French; among which were the corruption of manners, and the encroachment of the French upon their political rights, and then indignantly observes, "that the French, when they get sufficient strength, will soon begin to treat them as they do their black slaves:" he also complained of

the fondness of the young people for the French merchandize, and concludes by advising that the neighboring tribes should be invited to a league; that these tribes should be informed that the French being the stronger in the neighborhood of the Natchez, would first oppress them, and as they acquired strength, would extend their acts of oppression to the other tribes.

Du Pratz is very perticular in enumerating the prisoners restored by the Natchez to Loubois, at the capitulation before mentioned. M. de Loubois, (he says,) assured the agent of the Natchez, that he promised them peace as he demanded it in the name of the whole nation; but he granted it to them only on the condition, that they should restore not only the French women and children, but also the French men who were in the fort, and all the negro men and negro women, the negro boys and negro girls, which they had taken from the French. (M. de Loubois l'asura qu'il leur promittaiet la paix comme il la demandait au nom de toute la nation; mais qu'il ne la leur accordait quaux conditions qu'ils rendraient non seulement les femmes et les enfans Francais, mais aussi le Francais qui etaient au fort, et tous le negres, negresses, negrillons, et negrittes qu'ils avaient pris aux Francais.) Not one Indian slave is de-
(87) manded. Had there been any, Loubois had the will and the power to enforce restoration.

I have shown that the different European powers actively engaged in the African slave trade; that for the purpose they established military posts and incorporated companies; that England enforced the slave trade in Virginia; and I have shown that even in Virginia, where a statute had authorized Indian slavery, the Courts held that Indians were *prima facie* free. The case of Pallas and others *v.* Hill, in 2 *Hen. & Mun.*, shows that after the lapse of more than an hundred years, Indians have in that State sued for and obtained their freedom. In this African slave trade, I have shown that France also engaged. Du Pratz, in the volume before quoted, page 319, says that after the cession of the colony by the company to the King of France, he continued the management of the plantation then, viz: 1730, belonging to the King, and received pay for the negroes sold by the company to the inhabitants. I might pursue the same author through one hundred pages of his volume, and show M. Bourgmont eagerly engaged in making peace between the Padoucas and other tribes in alliance with the French, in order to remove all obstacles to the fur trade with those nations. I might dwell on the flattering language he addresses to them, and the desire which he assures them the King of France has, that they should live in peace and friendship with each other, and with the French. Who are the white men, he says to the Canzas, that demand slaves of you? if there be any, they are the enemies of all men, and their heart is all gall. Live then in peace, my dear friends; and then our sovereign will be your father, as he is the father of us all. (Qui sont les blancs qui vous demandent des esclaves? si'l y en a qui vous en demandent, ils sont ennemis de tous les hommes et leur coeur est tout fiel. Vivez donc en paix, mes chevs amis; et alors notre soverain sera votre pere, comme il est le notre a nous tous.)

I might then at the end of Bourgmont's voyage, introduce the author reflecting on the policy and address necessary to be used in the intercourse with the Indians, and the great profits of the fur trade, the object of Bourgmont's voyage; and ask if it be possible that the French could be so blind to their interests as to attempt to make slaves of a people, represented by the same author, so passionately fond of liberty, and whose friendship they had used so much industry to acquire.

But I will now take a view of what Raynal says of the intercourse between the (88) French and Indians. Raynal, one of the authors quoted by the appellee, says, in his account of the establishment of the French in North America, book 15, that in 1627 the French had in Canada only three miserable establishments surrounded with palisades. This languor, he says, had no other cause than the system of an exclusive company, which thought less of establishing a national power in Canada, than of enriching itself by the fur trade. Again, he says, the French had planned their establishments badly. In order to maintain the appearance of reigning over a great extent of country, and to get nearer to the peltry, they had made their settlements at such a distance from each other, that there was almost no communication, and they were not able to help each other. Chap. 10th of the same book, he says, the fur trade was the first object of the commerce of the Europeans in Canada. The French colony first carried on the trade at Tadousac, a port thirty leagues below Quebec. In 1640, the town of Trois Revieres, built twenty-five leagues above the capital, became a second store house. In time Montreal drew to itself all the peltry. In the month of June the bark canoes arrived. The number of savages that brought them did not fail to increase as the French became better known. The recital of the reception they had met with, and the sight of the goods they had received in exchange for their furs, all augmented the crowd. Never did they return to sell their peltry without bringing with them a new nation.

The English, he says, became jealous of this branch of commerce, and had almost ruined it, when the Court of France took the trade of these posts into their own hands and gave the Indians better treatment. The French traders, he says, sold their goods too high; this was all the ill treatment the Indians received from them. The English traders sold their goods lower, and consequently treated them better. Again he tells us that France had long labored incessantly to raise a chain of Forts which she thought necessary to her safety and to her prosperity in North America. Those she had built on the west and south of the St. Lawrence, to curb the ambition of the English, were large and strong. Those she had placed on the different Lakes, in important situations, formed a chain extending 1000 leagues north of Quebec; but they were nothing but miserable palisades destined to restrain the savages, and to assure herself of their alliance and the produce of their hunts.

Passing from Canada to Louisiana, both countries being under the same Governor, and governed by the same policy, we find Joliet and Marquitte returning home from (89) exploring the Mississippi, and giving an account of the Illinois, a numerous people much disposed to form an alliance with the French; and the Fort Maubile, built to keep in the alliance of the French, the Chactas, Alimabous, and other tribes less numerous, and to secure their peltry. Both in Canada and in Louisiana, the fur trade is the object of every establishment.

I have found in none of the historians any notice of an Indian slave population, either in Louisiana or in Canada. Stoddard, in the 12th chapter of his sketches of Louisiana, dwells altogether on African slavery, but says not one word of Indian slavery, nor does Breckenridge. Raynal, in 13th chap. of the 16th book of his History of the two Indies, so much referred to, says that his calculation (of the population of Canada) does not include the numerous allies scattered over a space of 1200 leagues in length by a sufficient width, nor even 46,000 Indians domiciliated in the neighborhood of the French settlements. None of them were ever subjects. In the midst of a great European population, the smallest tribes maintained their inde-

pendence. All men talk of liberty, but the savages alone possess it. It is not simply the whole nation, but it is each individual who is truly free. This author speaks of negro slavery in Louisiana, but not of Indian.

I might from the same authors have produced many more instances of the attention of the French to cultivate the friendship of the Indians of North America. I have not mentioned half the posts established for carrying on the fur trade. I might have produced more instances of the rivalry of the English and French in courting the friendship of those nations, and I might have produced instances of the French officers intermarrying with them and adopting their manners.

But we find no companies incorporated to carry on a trade in Indian slaves; no posts established to protect companies or individuals engaged in such a trade, nor even an Indian slave population in Louisiana or Canada once mentioned by the authors quoted, or any others within my knowledge.

Bourgmont, indeed, in the extract which I have made from his speech to the Canzas, seems to think that white men might have instigated the Indians to war for the purpose of buying their prisoners to make slaves of them. I will repeat his words. "Who are the white men that demand slaves of you? if there be any such, they are enemies of all men, and their heart is all gall. Live then in peace, my dear friends, and then (90) our sovereign will be your father as he is ours." From the tenor of the whole speech, I am inclined to think that traders in the Indian slaves were as much discountenanced in those times by the French Government, as traders in African slaves now are by the American Government.

The speech is entitled to some consideration, being addressed to the Canzas by an immediate commissioner of the King of France, then employed on his sovereign's business, and designed as it seems, to meet the King's eye; for the author tells us, page 216, that his account of Bourgmont's voyage was extracted and much abridged from the journal of that commandant; that he copied it from the original signed by all the officers and other persons who accompanied Bourgmont in this voyage. (Ce voyage detaille que je viens d'offrir aux yeux du lecteur, a ete extrait et tres abrege du journal du voyage de M. de Bourgmont au Padoucas. Je l'ai tire sur l'original signe de tous les officiers et personnes en place qui ont fait ce voyage avec ce commandant.)

I have now shown that both the English and French did not merely tolerate the African slave trade as was contended, but actively engaged in it for the supply of their colonies in North America. While, on the contrary, all the posts established by the French in North America, were designed to secure to themselves the commerce and friendship of the Indian tribes, and that an Indian slave population in Louisiana was unknown to the author cited by the appellee.

I conclude, then, that such a population was unknown to the laws and Government of France. That the small number of Indians which might have been purchased by French traders, were either clandestinely sold to other Indian tribes, or retained in the French settlements by the purchasers or their friends, under pretence that they remained voluntarily; and that under the French Government of Louisiana, the holders of such slaves never would have asserted, in a Court of Justice, a claim to property in an Indian. Accordingly we see those pretensions to property in Indians first ripening into claims under the Spanish rule, when the population of the province was disaffected by the Court of Spain, and Governors might be presumed to be disposed to do much to conciliate the rich and powerful at the

expense of the weak and defenceless. With all this evidence before our eyes, of the disposition of the French Government to court the friendship of the Indians, we are required to presume an unwritten law of France, permitting her subjects to reduce Indians to slavery. Unwritten it must be, since we find no book containing an account of it. But are not all the laws of civilized nations in reality written? and is not the phrase, *unwritten law*, merely a figure of speech? All men are, by the law of nature, free; and without some positive declaration of the sovereign power of the State to the contrary, all judicial tribunals, in my opinion, set at liberty every individual who sues for his freedom. On this point, then, I am for the appellant.

Fifth. I find nothing to induce me to think, that under the French Government of (91) Louisiana, private persons had a right to reduce Indians of the Natchez tribe to slavery: and the circumstance of an Indian being transferred by sale or gift can make no difference in the case. A person held in bondage can give no assent. No person can assent to enslave himself; and as to its being evidence of the assent of the Government under which he lives, I have before said enough. Had it been in evidence that the ancestor of the plaintiff was one of the 300 Indians sent by Perier into St. Domingo as slaves, I should have thought the plaintiff was lawfully held in slavery.

Sixth. It was not, I think, contended in argument by the appellant, that the declaration of Tayon, testified to by Reviere, amounted to an act of emancipation. On this point, I am for the appellee.

Seventh. On this point the law is clearly for the appellee. Negroes held in bondage under the French Government, would be considered lawfully slaves, unless they could prove their exemption from the common rule.

The judgment of the Circuit Court ought, in my opinion, to be reversed.

Opinion of WASH, J.

This cause is duly stated in the opinion delivered by my brother Judge, and in the briefs of counsel, and was very ably argued on both sides. Many questions have arisen in its progress; some of great interest and difficulty, which I shall not attempt to discuss. The only one I shall notice (it being decisive on the merits) grows out of the four first instructions asked for by the appellee's counsel, and given in the Court below, viz:—Whether an Indian of the Natchez tribe, taken prisoner in the war that exterminated that nation, might lawfully be reduced to slavery? I consider it as clearly settled by the testimony, that the maternal grand mother of the plaintiff was a Natchez woman taken prisoner by the French in the prosecution of an exterminating war against that tribe about the year 1731—that she was reduced to slavery, and that she and her descendants have been held in slavery ever since. The authority of Du Pratz is altogether consistent with the mass of evidence given on this head; and if it were not, it could weigh but little in opposition to it. Du Pratz, III, p. 326, says, that when the French returned to New Orleans with the Natchez slaves, "they put them in prison, but as it was too small to contain so many people long, without exposing them to infection on account of being crowded together, they placed the women and children upon the plantation of the King and elsewhere." (92) "On les mit en prison; mais comme elle' etait trop petite pour continer long tems tout ce peuple, sans s'exposer a entre infecte de leur visionage on mait les femmes et les enfans sur l'habitation du Roi et allieurs." And that "after a short time,

they embarked these slaves for the Island of St. Domingo, (by which means,) therefore, this nation became extinct in the colony." "Peu apres on embarqua ces esclaves pour l'ile de St. Dominique, afin que cette nation fut eteinte dans la colonie." This authority has been misunderstood, and standing alone, would justify the belief that some of these prisoners who had been "placed upon the plantation of the King and elsewhere," might have remained in the country. Be that as it may, the testimony, as I conceive, establishes the fact clearly, that the maternal grand mother of the plaintiff was so captured and did so remain. The first four instructions asked for by the appellee's counsel, were, therefore, correctly given, if the law be with them upon the main question. It has been conceded by the counsel for the appellant, that the municipal law might give title, but they contend that the law of nations could not: that there can be no proscription against human liberty or the claim to freedom, and that the appellee is bound to show that its title in its *inception* was legal. These positions have been maintained with great ability and research, but principles have been misapplied and the law is against them.

In America, the word nation is not of the same import as in other parts of the globe: here it is applied to small societies or independent tribes or communities, who subsist by hunting over a vast extent of Territory; whose ideas of property are limited to the game they catch or kill: amongst whom there is no distinction but what arises from personal qualities, being without government, authority, subordination or prescribed duties—whose actions flow from the impulse of their own feelings or passions, unchecked, uncontrolled, unpunished. No natural rights are surrendered. The first step towards establishing a public jurisdiction has not been taken by them. The right of revenge is left in private hands: if violence is committed, or blood is shed, the community does not assume the power of inflicting or moderating punishment; it is the right and business of individuals, whose resentment is implacable and everlasting. There is (properly speaking) no such thing as public war amongst savage tribes. They are more or less general, as the individual who may have been injured, may chance to be more or less beloved. All wars are private, for the re- (93) dress of individual or family wrongs; are conducted on the same principles, influenced by the same ideas, animated by the same spirit as in prosecuting private vengeance. Resentment may be sometimes suppressed or smothered, but is never extinguished; and often, when least expected, bursts forth with desolating fury. They fight not to conquer, but to destroy. The first article of their creed in prosecuting vengeance, is "never to look in peace upon the face of a living enemy." And though prisoners are sometimes taken, they are killed or enslaved, at the pleasure of the victor. Can it be contended for a moment, that the laws of nations regulating wars between civilized communities, were intended to apply to, or can operate upon such tribes? It may suffice to answer, that it never has been so held by any writers on those subjects, and that the high authority referred to, does in express terms assert the contrary, (Vat. p. 520,) the only one of the whole code that can be made to reach them, is the law of retaliation, to which civilized nations sometimes resort, and which they may rightfully enforce against all savage prisoners, without regard to age, sex, or condition. The description above, is applicable to the Indian tribes of North America generally, as they existed about the commencement of the 18th century; and to the Natchez nation at the time of their capture by the French. I deem it unnecessary to say any thing as to the authority by which the war was declared or conducted. Upon this point, then, I deem the evidence given in the Court below, en-

tirely competent, and the Circuit Court did right in giving the four first instructions asked for by the appellee's counsel.

I choose to avoid the discussion of the other main question involving the legality of Indian slavery in general, but deem it proper to state, that from every examination I have been able to make of the matter, in reason and in law, (if it is not a perversion of terms so to speak,) upon principle and authority, it should be placed upon the same footing with negro slavery. I incline to think, too, that much confusion and misapplication of principles has arisen from the double light in which slaves are regarded; partly as mere property, and partly as persons capable of asserting full rights.

There being a division of the Court, by operation of law, the judgment of the Circuit Court is affirmed.

(a.) See same case, 3 Mo. R., p. 540, in which this decision was overruled, and the case decided in conformity with the opinion of Judge Tompkins.

54

Decisions of the Supreme Court of Missouri.

JACKSON DISTRICT, DECEMBER TERM, 1828.

CAMSTER *v.* SHANNON.

Where evidence was offered under a special count, but rejected by the Court, and afterwards received under a general count, this Court will not reverse the judgment of the Circuit Court for that cause alone.

IN ERROR from Ste. Genevieve Circuit Court.

TOMPKINS, J., delivered the opinion of the Court.*

Camster filed his declaration in assumpsit against Shannon. It consisted of three counts. The two first counts are special, and the third is a general count of *indebitatus* assumpsit. The defendant filed the plea of non-assumpsit, with a notice of set-off; the jury found that the defendant did not undertake and promise, &c., and that the plaintiff was indebted to the defendant in the sum of $248 60, for which sum, judgment was given by the Circuit Court.

To support his declaration, the plaintiff in the Circuit Court (who is also plaintiff in error) produced a deed to Shannon for certain tracts of land; the consideration for the conveyance of said land, is in said deed stated to be, that Shannon had secured to be paid to the plaintiff, the sum of fifteen hundred dollars; the Circuit Court refused to receive this deed in evidence under the two special counts, but permitted it to be read in support of the third count.

In the opinion of this Court, the plaintiff has lost nothing by the refusal of the Circuit Court to permit the deed to be given in evidence under the first two counts, for no evidence of any other promise to pay money was offered, than what was re- (95) cited in the consideration of the deed above mentioned; even then, were the

*Wash, J., appears not to have been present during this term.

evidence improperly rejected, the Court is not disposed to disturb the judgment of the Circuit Court, inasmuch as the plaintiff has had the full benefit of his evidence.

The judgment of the Circuit Court is affirmed.

RISHER v. ROUSH.

1. Courts of Chancery cannot relieve against judgments at law, for the mistakes or negligence of the parties, even should the mistakes have been occasioned by the suggestions of the Court. (Note *a*.)
2. If a party has once submitted his case to a Court of Law, and it was proper for the Court to adjudicate thereon, and does so, he is precluded from any relief in Chancery.

IN CHANCERY.

M'GIRK, C. J., delivered the opinion of the Court.

This was an appeal from the Circuit Court of Cape Girardeau county, in a Chancery case.

This case appears to be, that Roush brought an action at law against Risher on a bond. To this action, Risher pleaded payment, and gave notice of set-off. On this state of the case, the parties went to trial, and judgment was had against Risher; no bill of exceptions was taken to any of the proceedings of the Court. Risher afterwards filed his bill in Chancery against Roush, to be relieved from this judgment, and enjoined proceedings on the same; the cause was heard before the Circuit Court, and the bill of Risher was dismissed, and the injunction dissolved.

The bill alledges that the money in the bond was paid: this is denied by the answer. The bill also alledges, that when, or about the time the trial was to be had in the Court below, certain depositions of Risher which would prove the payment, were set aside for informality; and that then he made his affidavit for a continuance, stating thereon what the testimony was, which was rejected; and that he expected to have the testimony by the next Court, &c., &c. And made his motion for a continuance, which motion was by the Court overruled; and that the Court gave as a reason for overruling the motion, that if the said testimony was there it would not avail any thing, because, that Risher's remedy was in Chancery.

(96) No bill of exceptions was taken to the overruling this motion, by which proceedings of the Court of Law, the complainant was induced to believe his remedy was in Chancery, and he therefore did not save the point of suppressing his depo-

sitions and refusing the continuance, whereby judgment went against him. And that he is now without remedy at law.

The answer does not admit nor deny these matters as to the depositions and continuance, but they are proved by the testimony of a witness.

The Circuit Court dismissed the bill, on the ground that the matter had been submitted to, and adjudicated on, by a Court of Law; and that a Court of Chancery could not now *overhaul* it.

When this cause was before this Court at the last term, I did incline to the opinion, that as the reason why the defendant at law failed to save his case, so that it could be revised in a Court of Error, was, owing to the suggestion of the Court, that the remedy was in Chancery, the party ought to have relief; but on reflection I am compelled to abandon that opinion. If the party chose to believe in the opinion of the Court, it must be at his own hazard; and it now seems to me to be no good grounds for relief in equity, that the Court or his counsel gave him bad advice; he should have excepted to the opinion of the Court in refusing to continue, and if on examination, this should be found to be error, then he would have had relief; but having failed to do so, furnishes no more ground for relief than he would have been entitled to, if the Court had committed any other error, and he had submitted to it till it was too late to redress it. I take the rule to be, that if a party has once submitted his case to a Court of Law, and the defence was proper for a Court of Law to adjudicate on, and it does adjudicate on it, that the case is forever closed against any relief in Chancery; unless the party is prevented by some fraud of the other party from making a legal defence, he must submit and abide the consequences of his own folly or negligence. Here no fraud of the other party is alledged as a reason for not making a defence; no uncommon calamity befel the defendant: he should, if his testimony was improperly rejected, have saved the point and reversed the judgment; or if properly rejected, and a continuance was improperly refused, have saved the point and reversed for that. But he has done neither, but relied on the mistaken opinion of the Court, given *obitur dictum*, that he would have relief in Chancery.

(97) We have looked into the depositions that were suppressed, for now they are made testimony in this case. By them, something like evidence of payment, or a demand by way of set-off, seems to be loosely established; but if the party has any demand good by way of set-off, he must be driven to his separate action for remedy, if he submitted no evidence on that point in the Court at Law, (see *Peake's Evi.*, page —). But in a Court of Chancery he cannot even have that benefit, his case being of a legal nature. Courts of Chancery cannot relieve against judgments at law, for the mistakes or negligence of the parties.

Judgment affirmed.

(a.) See Yontis v. Burditt, 3 Mo. R., p. 457.

Evans v. Hays.

1. The competency of a witness may be restored, by executing to him a release from legal liability.
2. Where a party brought assumpsit in the Circuit Court, after his demand had been reduced by direct payments, within the jurisdiction of a Justice of the Peace—held that he pay the costs of suit.
3. In an action of assumpsit against the Sheriff, for fees endorsed on an execution—held, that the execution should be received in evidence, notwithstanding the endorsement was a joint one, for the benefit of the plaintiff and another.

IN ERROR from Cape Girardeau Circuit Court.

Tompkins, J., delivered the opinion of the Court.

Evans sued Hays in the Circuit Court, for money had and received to and for his use. Evans had judgment before the Circuit Court for $19 66 3-4, and was condemned to pay costs, because his demand was reduced by *direct* payments, within the jurisdiction of a Justice of the Peace. It appeared in evidence that the defendant had been Sheriff; that the money he was charged to have received, was for fees taxed on executions to Evans, as attorney at law; and that he produced as a witness in this case, one William Garner, who had been his deputy whilst *this* money was said to have been in a state of collection; and, in order to make Garner competent to testify, he executed to him a release; but that Garner declared that he still felt (98) himself in conscience bound to pay Hays any thing that might be recovered of him in consequence of *his* (Garner's) *being his* (Hay's) deputy.

The plaintiff offered in evidence an execution issued out of the said Court, on which was endorsed an attorney's fee of six dollars; and on which said Evans and one G. A. Bird were marked as attorneys.

The Court admitted Garner to testify, and refused to suffer the execution on which Evans and Bird were marked as counsel, to be received in evidence.

The Court, in our opinion, properly admitted Garner's testimony, after the release made by the defendant. As to the rejection of the execution offered in evidence, more difficulty presents itself.

If it were a demand arising from a contract between the parties, there could be no doubt but it is one created by the operation of a statute law. The Court then is rather inclined to construe the law differently, and to distribute the fee allowed by the statute, equally among those who appear on record to be the attorneys for the successful party. When the names of the counsel are thus endorsed on the writ by the Clerk, the Court will presume that he did it by authority, and will justify the Sheriff for paying each his proportion, unless he be otherwise informed by the attorney feeling himself interested.

The judgment of the Circuit Court, is, for this reason, reversed and remanded. This Court, however, is of opinion, that the Circuit Court did not err, in sentencing Evans to pay cost, because his demand was reduced by payments within the jurisdiction of a Justice of the Peace.

RISHER *v.* THOMAS.

The Circuit Court have a right which is inherent, to make their own rules; but those rules, before they become obligatory, should have a reasonable publicity given to them.

IN ERROR from the Cape Girardeau Circuit Court.

TOMPKINS, J., delivered the opinion of the Court.

This cause was remanded from this Court, at the December term of the last year, (99) to the Circuit Court of Cape Girardeau county; and on the 31st day of May, 1828, the opinion of this Court, and its decision in this case, reversing the judgment of the Circuit Court were filed with the Clerk of the said Circuit Court; of which Risher had notice on the 18th day of June then next ensuing. On the 28th day of August of the same year, this cause was tried in the Circuit Court, when judgment was again given for the plaintiff. Before the trial the defendant moved for a continuance, alledging that his cause was docketed before others that had precedence of it; and that it had been till that time the practice of the Court, to try causes remanded from this Court, at the second term after they were filed. Such appears to have been the practice of that Court. But on the 30th day of June, 1828, the Judge of that Court had, between terms, made and filed with the Clerk of the Circuit Court of Cape Girardeau county, a rule, that when transcript of records of this Court shall be filed with the Clerks of the Circuit Courts, such cases shall stand for trial, &c., as other causes, after the defendant shall have had notice in writing, at least thirty days, of the filing of such transcript. It does not appear that the plaintiff moved the Court to give to his cause its proper place on the docket. He cannot then complain that his cause was called for trial before its turn on the docket.

The right of the Circuit Court to make its own rules is a right that is inherent; but those rules, like the rules or law prescribed by a legislative body, ought to have a reasonable publicity given to them before they become obligatory. By the rule above mentioned, the practice of the Circuit Court had been materially changed, and this rule had been made in vacation, when it is not reasonable to suppose that either the plaintiff or his counsel could have known of its existence; it does not appear that either the one or the other had any knowledge of its existence. Had the rule been adopted in term time, when the members of the bar might reasonably have been expected to attend, this Court would have thought that sufficient publicity had been given to it. But as it was adopted in vacation, we are inclined to think it ought to have had no binding force till one term had elapsed after its adoption.

The judgment of the Circuit Court is, therefore, reversed, and this cause remanded for further proceedings.

(100) NETTLES *v.* SWEAZEA AND OTHERS.

1. Where several defendants are sued, some acquitted and others found guilty, and the judgment is reversed, on a second trial all the defendants may join in a plea unless the plaintiff is injured by it.
2. A general demurrer will not lie where the plea is good in form and substance, though pleaded out of time - the objection should be made to filing.
3. A plea *puis darrien continuance* may be pleaded *nunc pro tunc*, notwithstanding there has been a continuance since the existence of the subject matter of the plea. (Note *a*.)
4. On a plea of release, the venue may be laid according to the truth, no matter where made.
5. On plea of release, pleaded *puis darrien continuance*, costs should be awarded the plaintiff to the time of filing—the defendant after that time.

IN ERROR from the Cape Girardeau Circuit Court.

M'GIRK, C. J., delivered the opinion of the Court.

This was an action of assault and battery by Nettles against Sweazea and several others; the plaintiff had judgment, and that was reversed, but on the trial some three or four persons were acquitted, the others found guilty, when this judgment was reversed and sent back to be tried. All the defendants to the original action joined in a plea of release; this plea showed that the release was made before the former trial, and of course a term had intervened between the time of making the release and the time of pleading. The plea was demurred to; the demurrer was overruled, and judgment for the defendants. The error assigned is a general one.

The points relied on in argument are, first, that the defendants acquitted, and those found guilty on the first trial, have joined in the plea; this point is not much relied on. The law on this point is, that Nettles cannot avail himself of this if it be wrong, unless he can show that in some way he is injured by it. I cannot see how he is injured; this point is ruled against him.

Second point is, that this plea is bad, because it appears by the record that a term had elapsed between the time of the release being made, and the time of pleading it. This point is ruled for the defendants in error; a general demurrer cannot reach this matter. If the plea is good in form and substance, but is pleaded out of time, the objection should be made against filing it; and the fact whether a continuance had (101) intervened or not, has, as I conceive, no other effect than to regulate the costs accrued to the time of the plea pleaded. It appears by Chitty's pleadings, 637, that though a term had intervened, the Court allowed the party to file his plea, *puis darrien continuance nunc pro tunc.*

Third point is, that the plea is bad, because it shows the award and satisfaction took place in a different county from that in which the trial was to be had; the answer to this is, that the venue as to the making the release, may be laid according to the truth, no matter where the fact took place.

Fourth point is, that the Court erred in giving judgment for the whole costs against Nettles; this point is ruled for the plaintiff in error. The judgment in the Circuit Court should have been for costs in favor of Nettles, up to the time of pleading the release, and after that time in favor of Sweazea. The judgment of the Circuit Court upon the demurrer, is affirmed, and as to the costs, reversed, and the costs up to the time of pleading the plea of release is to be adjudged against Sweazea, and after that, against Nettles, and Sweazea pay the costs of this writ of error.

(*a.*) See Thomas *v.* Van Doren et al., 6 Mo. R., p. 201.

Decisions of the Supreme Court of Missouri,

JACKSON DISTRICT, APRIL TERM, 1829.

BYRD AND OTHERS v. GOVERNOR OF MISSOURI, TO USE, &C.

1. The improvement of the real estate of an intestate, by the administratrix, is a misapplication of the funds of the estate, and the security will be liable for the waste committed.
2. Under an agreement that the security will be permitted to make use of any equitable defence he may have," &c.—held that evidence is admissible to show the increased value of the estate; for which, under the agreement, the security will be entitled to a credit.

TOMPKINS, J., dissenting.

IN ERROR.

WASH, J., delivered the opinion of the Court.

This was an action of debt commenced in the Circuit Court, against Byrd, as the security in an administration bond. On the trial, an agreement between the defendant and the creditors of the deceased was read in evidence, by which it appears as follows: "that Col. Byrd proposed to go into the Circuit Court and enter his appearance without writ, to such suits as the creditors of Chamberlain may institute against him, for waste on the administration bond. All creditors may institute suit, and he will agree with the creditors to try one to establish the amount of the waste; and that judgment shall be entered up against him for the waste in favor of each creditor in proportion to the whole amount wasted, and the parties are to permit Col. Byrd to make use of any equitable defence he may have, &c."

Several breaches were assigned, and on the plea of *nil debet*, the waste was established to the amount of $1503 19 1-4 cents. The defendant then proved, that "pre-

vious to the death of the intestate Chamberlain, he had dug and walled a cellar on a (103) lot in the town of Jackson, that after his death the said Eliza, (administratrix,) before the said estate was declared to be insolvent, went on to build, and did actually build, a brick house on said lot, on the foundation made by the said Jason, (the intestate,) in his life time, as aforesaid;" and it was proven that the building the said house could not have cost the said Eliza (the administratrix) less than twelve or thirteen hundred dollars. The defendant further proved on the trial, that the administration of said estate was taken from said administratrix, and given to said defendant. That in the year 1822, on his (defendant's) application to the Circuit Court of the county of Cape Girardeau, the Court ordered him, the said defendant, as administrator *de bonis non*, to sell all the real estate of Jason Chamberlain, (the intestate); that in pursuance of said order, he did sell at public sale, the said real estate; that amongst the rest, he sold the said lot and brick house, in the town of Jackson, for seven hundred and seventy-five dollars, all of which, he paid by order of the County Court, to the creditors of said Chamberlain. The defendant further proved on the trial, that at the time of said sale of said lot by said administrator, the lot on which said brick house was built, with the cellar walled as aforesaid, was not worth more than one hundred dollars; and the defendant claimed as an equitable credit, (under the agreement of the parties as aforesaid,) six hundred and seventy-five dollars, the difference between what said lot, with the cellar aforesaid, was worth at the time of the sale aforesaid, and what the lot with the house aforesaid sold for, which was applied to the payments of the debts due; but the Circuit Court rejected the testimony and gave judgment for the full amount of the estate wasted, to which the defendant excepted, and by a bill of exceptions, has spread the agreement and evidence upon the record.

The only question to be considered is, did the Circuit Court err in rejecting the testimony? As to the strict law of the case, there can be no doubt; the administratrix in building the house, made a gross misapplication of the funds of the estate, and her securities were liable for the waste committed. By the agreement, however, the defendant may well claim a credit for the improved value of the estate which had been applied towards the payment of the debts due the intestate. It will ever be a difficult matter to determine, under such circumstances, the amount to be allowed; but when the proof can be made, there can be no good reason why it should not avail the defendant; it would be any thing else than equitable, to allow the creditors to (101) receive the improved value of the estate, and then to recover the full amount of the assets which had been wasted, or misapplied toward the improvement.

The Circuit Court erred, therefore, in rejecting the testimony, and the judgment must be reversed, and the cause remanded for further proceedings, conformably to this opinion.

TOMPKINS, J. dissenting.

I dissent from the opinion of the Court, believing that in equity, no allowance would be made to the administratrix for building a house on the land of the intestate. On the contrary, that at law and in equity, it is a waste to expend the money of the intestate in this manner; and that the administratrix would lose her money equally as if she had built a house on the land of any living person without his assent.

SCOTT *v.* JACKSON.

Where mortgaged property is sold and the proceeds of the sale are insufficient to pay the mortgage debt, the mortgagor is personally liable for the remainder of the debt, unless it was a part of the agreement that the mortgagee should rely solely upon the mortgaged premises.

IN CHANCERY from Ste. Genevieve county.

TOMPKINS, J., delivered the opinion of the Court.

Scott filed his bill in the Circuit Court of Ste. Genevieve county, stating that on the 12th day of July, 1815, Jackson executed to him his deed of mortgage for certain land, to secure to Scott the sum of five hundred dollars, by Scott to Jackson paid; that Jackson failing to pay the said sum of money according to agreement, he (Scott) filed in the Circuit Court of Ste. Genevieve county, his petition for the foreclosure of said mortgaged premises, and for the sale of said mortgaged premises, to pay the said five hundred dollars and the interest thereon due; that said property was sold for one hundred and eleven dollars, and that no other or further sum of money had been paid him, and prays the following questions may be answered by the defendant:

First. Whether Jackson did not borrow the sum of five hundred dollars in said mortgage ment oned, at the time mentioned, and on the conditions mentioned; and if (105) not, what sum of money did he borrow, and at what time, and on what conditions?

Second. Whether said mortgage was not made to Scott merely as a security for said sum of five hundred dollars with interest, &c.; and if not, for what purpose was it made?

Third. Whether said mortgaged premises were not as before stated, sold for the sum of one hundred and eleven dollars, and if not, for what sum were the same sold, and for how much, and when were they sold?

Fourth. Whether he, Scott, has been paid by Jackson or by *any* person for him, any other and further sum than the said sum of $111; and if so, what sum has been paid, and when, and by whom, and to whom?

Fifth. Whether the said sum of five hundred dollars with interest thereon from the date of said motgage until the (then) present time is not justly due to Scott, after deducting the said sum of $111; and if not, what is due?

Sixth. Whether the proceedings mentioned in the bill to have been had for the foreclosure of said mortgage have not been had, and if not, what proceedings have been had, and how and when?

And it is then prayed that Jackson may be decreed to pay the remaining part of the aforesaid sum of $500 with interest thereon due.

To the interrogatories the defendant answers, that he never did borrow of the said John Scott the said sum of five hundred dollars or any sum at any time, or on any conditions, and that said mortgage was given to secure the payment of the said sum

of five hudred dollars to said Scott, so far as said mortgaged premises would secure the payment of that sum, and no farther; and to leave it in the power of the respondent to pay the said five hundred dollars, or forfeit the mortgaged premises at his pleasure.

The complainant excepted to the answer; first because the defendant did not state whether the said mortgaged premises did not as in the bill stated, sell for $111, and no more.

Second. Because the defendant did not state whether the complainant had been paid by the defendant any other sum than the said sum of $111; and if so, what sum, &c.

Third. Because the defendant did not state whether the said sum of $500, with interest till the (then) present time, was not justly due to the complainant, after deducting therefrom the said sum of $111; and if not, what sum was due to the complainant.

(106) Fourth. Because the defendant did not state whether the proceedings in the bill stated to have been had for the foreclosure of said mortgage and for the sale of the mortgaged premises, had not been had; and if not, what proceedings had been had.

It is assigned for error among other things, that the exceptions taken to the defendant's answer were overruled in the Circuit Court. Many other errors were assigned, some of which were assigned from wrong impressions of the state of the record. The counsel for the plaintiff in error, not having it before him, and the Court does not at this time think it material to decide on others. The counsel for the defendant in error, assumes the ground, that the bill does not contain sufficient equity to warrant a decree. This Court thinks otherwise. It is also the opinion of the Court, that the exceptions to the answer were well taken.

The judgment of the Circuit Court is, therefore, reversed, and the cause remanded for further proceedings.

Decisions of the Supreme Court of Missouri,

ST. LOUIS DISTRICT, APRIL TERM, 1829.

Ashley v. Bird.

Where A. sells lands to B., under a power of attorney, receives the purchase money and pays over the same to his principal; and afterwards B. sues A. and recovers judgment for the purchase money so paid, on the ground that the power of attorney under which A. acted was void and of no effect—A. will be left to his remedy against his principal to whom he paid over the purchase money.

Tompkins, J., delivered the opinion of the Court.*

Bird filed his bill on the Chancery side of the Circuit Court of St. Louis county, against Ashley and others, executors of Elias Rector, deceased, stating, that in the year 1819, he, as agent of Abram Bird, his father, and acting under a power of attorney, which he supposed gave him ample authority, sold to the deceased E. Rector, three hundred and twenty acres of land, being the half of a larger tract owned by said Abram, for the sum of nine hundred and sixty dollars; and that as attorney in fact for said Abram, he executed a bond or covenant for the title of said land; that before the time limited in said bond or covenant for making the title to the said land, said Abram Bird died; that said E. Rector in his life time, informed the complainant he had sold and transferred all his right, title, and interest, in said tract of land, to Stephen Rector; that afterwards, in the life time of said E. Rector, the complainant together with Stephen Rector and others, as proprietors, laid out a town partly on said tract, so sold to said Elias, and partly on the residue of the larger tract of said (108) A. Bird: and a public sale of lots of said town was had by said proprietors, embracing a considerable portion of said tract of land sold as aforesaid to E. Rector; that the notes taken at said sales for the consideration of said lots, were divided among

*Absent, Judge Wash.

said proprietors, and that Stephen Rector took one half of the notes aforesaid, and collected a large sum of money from the makers thereof; that he knows not whether any part of said land is unsold by said Stephen Rector; that after the death of said Elias Rector, his executors commenced an action at law against the complainant for money had and received for the use of said Elias, to recover the purchase money paid as aforesaid by said Elias, and had judgment for the same, the power of attorney under which the complainant sold the land to Rector being decided to be insufficient, which judgment was affirmed by the Supreme Court. That Stephen Rector is also dead, and that the estates of Elias and Stephen Rector are insufficient to satisfy the demands against them respectively; that the heirs of Abram Bird have given the complainant a power of attorney to make a deed to E. Rector's representatives; that one of them is a married woman; that the complainant paid over the purchase money to A. Bird in his life time, who expressed himself well satisfied with the terms of the sale, and he further states that said Abram by the receipt of said money confirmed in equity the said sale to said Rectors made as above stated by the complainant, and that though he should pay over the said sum of money to said Ashley, he would have no means of obtaining the equitable title of said land divested of the rights of said Stephen and of the owners of the lots in said town; that no person has hitherto had recourse upon said Elias or his estate on account of the want of a legal title to said land; that the complainant believes no person has any wish to do so; that the present claimants of the different subdivisions of said land, wish the legal title to be made to them in all instances, as the complainant believes. That a patent has been obtained for said land; that if E. Rector's representatives should not obtain the title to said land, the holders of the town lots can have no remedy against the insolvent estates either of Elias or Stephen Rector.

The bill prays that the executors of Elias Rector may be enjoined from collecting the purchase money on the judgment above mentioned, and that a specific performance of said contract may be decreed.

To this bill the defendants demurred, for want of equity. The Circuit Court over- (109) ruled the demurrer and decreed that the executors should be perpetually enjoined from collecting the money aforesaid.

The complainant controverts two objections taken by the defendants; First. That proper parties had not been made to the bill. Second. That there was no equity; and says, "first he takes the position that proper parties have been made, they are the same in the suit at law; and that it was not necessary to make the present owners of the different subdivisions of the land parties; 1 *Johnson Chan. Rep.* 349, 438; 2 *Johnson C. R.* 197, sustains the position that the general rule requiring all persons interested to be made parties to the suit, is confined to parties involved in the issue, and who must necessarily be involved in the decree, and that it is a rule of convenience merely, and may be dispensed with, when it becomes extremely difficult or inconvenient." Had any of the persons claiming this land under E. Rector been made parties to this bill, it might have been material to examine the authorities here cited. But as none of them are either complainants or defendants, the authority of those cases is conceived to be of no avail.

Thompson Bird, the complainant, comes and asks an injunction, because, he says, A. Bird in his life time, by receiving the purchase money, confirmed the sale in equity. That the claimants under E. and S. Rector would not be able to have the sums they have respectively paid, refunded out of the insolvent estates of E. and S. Rector, and

though he should pay the amount of the judgment, he would have no means of obtaining the equitable title of said land, divested of the rights of said Stephen, and of the owners of the town lots.

Now although this solicitude to secure the claimants under Rector is very laudable, yet it seems from his own view, useless and out of place. If S. Rector and the owners of the town lots, whose rights he cannot divest, have such equitable claims as he contends, then they can, whenever they wish, proceed to establish that claim and the payment (by him) of the amount of this judgment will be no injury to them. If those purchasers were complainants, praying that Rector's representatives might be compelled to take the land for the reasons assigned by this complaint, it might be necessary for this Court to decide whether this sale by T. Bird to E. Rector were good in equity, and whether his representatives should be compelled to take the legal title. Again, had the heirs of A. Bird come in and offered to make a good title, it would have been material for this Court to have decided how far Rector's representa-
(110) tives were bound to accept it. But inasmuch as neither the purchasers under Rector, nor the heirs of A. Bird are complainants; and moreover, as it does not appear to the Court that a good title will be made to Rector's representatives, the complainant must be left to his remedy against the administrators of A. Bird, to whom he paid over the purchase money.

The judgment of the Circuit Court is reversed.

McKnight and Brady, adm'rs, *v.* John Bright, &c.

1. Where the purchase money for land remains unpaid, it is a lien on said land against all subsequent purchasers, with notice. (Note *a*.)
2. A party cannot recover on a ground foreign to his bill.

APPEAL in Chancery from the Circuit Court of St. Louis county.

McGirk, C. J., delivered the opinion of the Court.*

The complainants' bill was dismissed: to reverse the decree of dismissal, the cause is brought to this Court.

The bill alledges, that on the 1st of August, 1819, John McKnight, one of the intestates, and Thomas Brady the other intestate, did make and execute their deed of conveyance, of and to a certain piece of ground in the town of St. Louis, to one Josiah Bright and one Charles Sanguinet and their heirs in fee, who were at that time

*Absent, Wash, J.

partners in trade. That on the face of the deed there is an acknowledgment that the consideration for the land was fifteen hundred dollars, and that the deed acknowledges the receipt thereof, in the usual form. That in truth no money was paid, but that to secure the payment of the consideration, two notes were executed by Sanguinet & Bright, for $750 each, to McKnight & Brady, on the 24th November, 1819. The one payable in January, and the other in June succeeding. No mention is made in these notes about the consideration thereof. The bill avers that these notes were given to secure the payment of the purchase money. The bill further alledges that a short time thereafter Sanguinet & Bright having contracted debts to a large amount, (111) dissolved partnership, and that being so indebted, they did on the 4th May, 1820, by a deed convey a part of said land to one Tholizon, the brother-in-law of said Sanguinet & Bright, for the expressed consideration of about $1600. That at the same time, Sanguinet conveyed by deed his half of the residue of the land to Bright and withdrew from the firm. That on the 19th May, 1820, Bright made a deed of mortgage of the premises to his father who lived in Massachusetts, to secure the payment of $8,000 due by Josiah Bright to John his father. That shortly thereafter Sanguinet & Bright took the benefit of the insolvent debtors act.

The bill shows also, that other creditors of Sanguinet & Bright obtained judgment against them, had execution and levied the same on the mortgaged premises, had the same sold after Bright's mortgage was made, and the same was bought in by J. Bright, or for him, by his agent, for $50. That John Bright afterwards made a lease of the premises to John Shackford, who is also a defendant in the cause in Chancery. The bill charges that the deed from Bright & Sanguinet to Tholizon is fraudulent, as being made on the eve of insolvency, and the same being made on a feigned consideration. The proof is, that Sanguinet, one of the firm, owed Tholizon about $1,200 and not $1,500, and for that the deed was made.

The bill charges that the deed from Sanguinet to Bright was fraudulent for the same reasons. There is no positive proof for what reason this deed was made, but it is assigned by the appellee's counsel that there is enough on the record to show that it was in consideration that Bright had joined in the conveyance to Tholizon to pay Sanguinet's debt, and that Bright was to pay the debts of the firm. The bill insists that the mortgage deed by Josiah Bright to his father, is fraudulent for the same reasons.

The proof is, as appears by the answer of John Bright, that the firm of Sanguinet & Bright owed him at the date of the execution of the mortgage about $3,000, and that Josiah Bright owed him on his private account about $1,600.

The bill insists that the lease to Shackford is fraudulent and void, because derived through a fraudulent grantee.

The bill seeks to set these several deeds aside, and prays that the debt of McKnight & Brady may be decreed a lien on the premises, and that the same may be sold to pay said debt.

The first point made by the appellant, is, that where the purchase money for land (112) remains unpaid, it is a lien on said land against all subsequent purchasers of said land, who purchase with notice of said purchase money being unpaid. It is conceded by the counsel on the opposite side that this is the law.

But it is insisted on by him that in this case there is no proof that John Bright or Shackford had any notice express or implied, that the purchase money was unpaid.

And secondly, that in this case, there is no proof that the notes of Bright & Sanguinet, mentioned in the bill, were given to secure the payment of the purchase money of the premises.

The bill alledges that they were so given. The testimony of Sanguinet says nothing about it; John Bright says in his answer, he knows nothing about it; and Shackford denies all knowledge on that subject. There is no other proof as to this matter. This is a material point to be proved, and for want of this proof, the lien, if no other reason stood in the way, cannot be set up.

It is insisted by appellant's counsel, that if this objection should prevail, yet that the deeds to Tholizon, Josiah Bright, John Bright, and the lease to Shackford, ought to be set aside as fraudulent, and the property subjected to the payments of debts, and particularly to the payment of this debt. The appellee's counsel makes two objections to this: First, that in this case, the bill proceeds on no such ground, and that the party cannot recover on a ground foreign to this bill. This is a solid objection, the bill seeks no such object. The other objection is, that the complainants must do all they can at law, before they can go into chancery. This objection seems to be good as far as it is warranted by the record.

But the record shows that on one of these notes, judgment was obtained upon the whole matter.

The decree of the Court below, is affirmed.

Many other points were made in this case, which I will take no notice of, as this case is decided on the foregoing points.

(*a*.) See Marsh *v.* Turner & Lisle, 4 Mo. R., p. 253.

(113) CITY OF ST. LOUIS *v.* SMITH.

1. The fine of $100 imposed by an ordinance of the corpora ion of St. Louis, upon persons keeping tippling houses and retailing wines, &c., without license, has, by a subsequent ordinance, been reduced to $90, and Justices of the Peace have jurisdiction.
2. The corporation has the power, by its charter, of imposing a fine upon persons keeping tippling houses and retailing wines, &c., without having first obtained license from the corporation.

ERROR from St. Louis Circuit Court.

M'GIRK, C. J., delivered the opinion of the Court.

This was an action of debt for one hundred dollars, brought before a Justice of the Peace for a penalty. The Justice gave judgment against the corporation, whence the cause was removed to the Circuit Court, where judgment was again given against the corporation.

The points on which the Circuit Court went, were:

First. That a Justice of the Peace, under the law of the land, had not jurisdiction of the sum of $100.

Second. That the corporation had not power by their charter to create the offence out of which this penalty grew.

The record shows that the suit was commenced under the provisions of an act or ordinance of the city, entitled "An ordinance to reduce into one the several ordinances for levying and collecting taxes in the city of St. Louis," which imposes a fine of $100 upon persons for retailing wines and spirituous liquors in less quantities than one quart or bottle, to be drank in the house, without a license to keep a tippling house first obtained from the city.

The bill of exceptions shows that Smith did so retail without the license required.

Several ordinances and the charter are upon record, which will be noticed as occasion may require.

A subsequent ordinance to the one on which the suit was brought, declares that from and after the passage thereof, all ordinances and parts of ordinances fixing a penalty for the transgression of the same, a specific sum not within the jurisdiction of a Justice of the Peace, be and the same are hereby repealed. Section second says that all specific sums fixed as a fine and forfeiture as aforesaid, be reduced to the (114) sum of ninety dollars, and to be recovered by action of debt, founded on this ordinance, before any tribunal having jurisdiction thereof: page 30 of the ordinance book.

I understand that the first section of this last act is predicated on the idea that there may be some specific penalties above the jurisdiction of their own Justices, (for I think they must be intended to refer to those Justices only over which they had power,) which may be, and I think is, a mistaken idea. At all events the act on which this suit is brought is not one of that description, for by the charter the Jus-

tices may have jurisdiction to any amount. By the amended charter, section 9, it is declared that Justices of the Peace within the city shall have jurisdiction of all cases arising under the first act of incorporation under the amended act, and under the ordinances. And I see nothing in the ordinances which expressly defines their jurisdiction.

But it is most clear that this penalty is reduced to $90, by the second section of the 5th March, 1827. But I think that this, by the ordinance of 24th January, 1829, is cured. This ordinance gives great latitude in matters of this kind, and declares that all that is necessary is, that the defendant should be informed of the nature of the charge against him. In this case the defendant is expressly told by the summons, that he is to answer for the offence of keeping a tippling house without a license, contrary to the act, reciting it. This, I think, is enough to let him know what to defend against in the case.

The next and most material point is, whether the corporation had power to pass the ordinance licensing tippling houses, and fixing a penalty for those who should keep them without such license. To know what powers are granted, it will be necessary to look to the charter; and so much of that charter as I deem material, I will quote. The 12th section declares that the Mayor and Board of Aldermen shall have power to lay taxes, &c.; to make regulations to prevent the introduction of contagious diseases; to make quarantine laws; to prevent and remove nuisances; to provide for licensing, taxing and regulating auctions, retailers, ordinaries, taverns, billiard tables, &c.

Then it says, to restrain and prohibit tippling houses, gaming houses, bawdy houses, and other disorderly houses, &c.

It may be remarked here, that the act respecting taverns authorizes the County Court to license dram shops, and it is insisted that dram shops and tippling houses (115) are synonymous. I think they are, so far as respects the meaning of the charter.

The question which is made on this part of the subject, arises on the words to restrain and prohibit tippling houses. It is contended on the part of Smith, that to license and fix a penalty for keeping such house without license, is not to restrain but to encourage and create.

I understand the construction of this part of the charter to be this: That the Legislature understood that tippling houses, &c., already existed, and that they intended to give the corporation, by the words restrain and prohibit, two powers. One was to prohibit their existence altogether, if they thought it best to do so, and the other was to keep them within certain limits as to the number and order, as they should think best.

But as to the tippling houses, bawdy houses, and gaming houses, whether the corporation could legally license them if they chose to do so, instead of prohibiting them, I think depends upon the fact, whether by the law of the land they were permitted to exist.

Now as to the bawdy houses, they could not be authorized by the corporation law to exist, because it is contrary to common law that they should exist. The corporation might suppress them if they existed against the general law, but if it did not choose to do so, then it might restrain them within such limits as it might see fit. But as to the tippling house, by law it may exist. The County Court may grant it a

license, and I cannot see how the corporation could well prohibit their existence if the County Court should license them.

Then as to the tippling houses licensed by the County Court, the corporation may restrain, and where not authorized by the County Court, may suppress and prohibit altogether.

The question then arises, what is meant by restrain? I understand that any impediment thrown in the way of an unlimited exercise of a power, is a restraint; the restraint may be so great that it amounts almost or entirely to an exclusion to the exercise of the power. Yet it may be less, so much so that the restraint is scarcely perceptible. To require a license on the payment of fifty dollars, or to pay a fine of one hundred for neglect of this license, is a restraint. It may be a sufficient one, and if not, the corporation may provide other restraints.

(116) Upon the whole matter, I am of opinion the judgment of the Circuit Court is erroneous. It is reversed and sent back for a new trial.

Tompkins, J., dissenting.

I contend that the act of Assembly, giving the corporation power to restrain and prohibit tippling houses, &c., does not authorize it to license such houses. To restrain, in my opinion, means to restrict within certain bounds, viz: to prescribe the hours within which their doors may be kept open; to make regulations to prevent, more effectually, all disorderly practices peculiar to the habits of persons frequenting such places in a city, &c. &c. In the rest of the opinion I concur.

PHILIPSON TO USE OF MENARD v. BATES' EXECUTOR.

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1. An action of assumpsit for money had and received, will lie to recover money paid upon a contract for the conveyance of land, where the other contracting party refuses to comply with his contract, or is unable so to do, or where the contract has been rescinded; but where the plaintiff declares specially upon the inability of the defendant to make a good conveyance, the nature and extent of the inability must be set forth
2. To admit secondary evidence, it must, under the circumstances, not only appear to be the *best*, but it must be the *best legal* evidence.
3. A certified copy of part of a record is inadmissible. The whole record must be certified, in order that the Court may be in possession of the full effect of it, for a partial extract may bear a very different import from the whole taken together.

ERROR from the St. Louis Circuit Court.

WASH, J., delivered the opinion of the Court.

This was an action of assumpsit commenced by the plaintiff against the defendant in the Circuit Court. The declaration contains two counts. The first is a special count on the contract, charging that on the 5th of July, 1822, the defendant's testator, (Frederick Bates) by an instrument in writing signed by him, but not sealed or purporting to be sealed, in consideration of $1600 to him in hand paid by said plaintiff, Philipson, the receipt whereof was thereby acknowledged, granted, bargained and sold unto said Philipson or his assigns, two lots of ground, situate immediately above the town of St. Louis, and making part of a larger piece of ground which had been laid off in building lots by William Smith, Manuel Lisa, and said Frederick, which said lots are designated as lots No. 31 and 32, on a plat made of said larger piece of ground by Joseph C. Brown, deputy surveyor; and that said Frederick promised and bound himself by said instrument, to make or cause to be made unto the said Philipson or unto his assigns, a regular deed of sale of said two lots as soon (117) as the hindrance occasioned by the demise of William Smith and Manuel Lisa shall have been removed, &c., and averring that said Philipson had been at all times ready and willing to receive a regular deed, and often requested said Frederick Bates in his life time to make said deed, and to remove or cause to be removed any hindrance that might exist in consequence of the death of said Smith and Lisa. Yet the said Bates did not in his life time make said deed, nor remove or attempt to remove the hindrance occasioned by the demise of said Smith and Lisa, and that since the death of said Bates, the undivided third part of said lots had been levied upon and sold by the Sheriff of St. Louis county by virtue of an execution, &c.; and that the remaining two-thirds are still subject to the lien of a judgment originally rendered against Manuel Lisa; and that by reason of the premises, no deed or title whatever can now be made by heirs or representatives of said Bates or of said Smith or Lisa, or either of them, &c. The second is a general count for money had and received.

On the trial in the Circuit Court, the defendant's counsel moved the Court to strike out the first count of the declaration, which was done accordingly.

The plaintiff proceeding to trial on the second count, offered in evidence the copy of a deed from Frederick Bates to William Smith and Manuel Lisa, under the certificate of the recorder, that the same was a true copy of the record in book F, page 375, in his office. After having proved by the executor of Lisa, and by the person having access to Smith's papers, that the original of which it purported to be the copy, was not to be found amongst their papers. The defendant's counsel objected to the copy, as inadmissible evidence, and the Court sustained the objection. The plaintiff then offered in evidence certain documents, being the copy of a judgment of the old general Court for the Territory of Missouri, rendered at their May term, 1813, against Manuel Lisa, and Jaquez Clamorgan, and also the copy of a decree in the Supreme Court for the State of Missouri, rendered at the November term, 1825, on an appeal in Chancery, from a decree rendered in the Superior Court of Chancery at its November term, 1821, against the executors of Lisa and Clamorgan, dissolving the injunction obtained on the original judgment rendered in 1813, and reviving the lien of said judgment—to the reading of which, the defendant's counsel also objected, and the Court sustained the objection and excluded said documents.

The plaintiff gave in evidence, the contract between Frederick Bates and Simon (118) Philipson declared on in the first count, and a deed of conveyance from Peter Chouteau and wife, dated the 6th of August, 1817, to Manuel Lisa, for certain premises therein described, and proved that the lots sold by Bates to Philipson, were part of the ground sold and conveyed by Chouteau and wife to Lisa; and also the Sheriff's deed to O. N. Bostwick for the undivided third of said two lots, sold by virtue of a judgment and execution as the property of Manuel Lisa, &c.

It was also proved by the plaintiff, that the consideration of $1600 expressed in the contract, had been received by Bates in *real property*, at an agreed value conveyed to him by the plaintiff's brother, in part satisfaction of a debt due to the plaintiff from his said brother.

The defendant's counsel then moved the Court to instruct the jury, that there was no evidence to sustain the second count, which instruction was accordingly given, &c.

The first error assigned, is for striking out the first count. It is insisted that the statute law of this State, R. C., p. 632, section 40, does not authorize the Court to strike out a faulty count, upon motion, at the trial; and also, that said first count is not faulty, but good in law, and would entitle the plaintiff to judgment on general demurrer. The words of the statute are, that "where there are several counts in a declaration, one or more of which are faulty, and entire damages are given, the verdict shall be good, but the defendant may apply to the Court to strike out such faulty count or counts, or to instruct the jury to disregard them. The clause is certainly an extremely awkward one, and presents the subject, as it were, heels foremost. It should read, "where there are several counts in a declaration, one or more of which are faulty, the defendant may apply to the Court to strike out such faulty count or counts, or to instruct the jury to disregard them, but if he shall neglect to do so, and entire damages are given, the verdict shall be good." And it has been practiced upon as if it so read. This construction, which the Courts have given to it, is the only sensible one of which it is susceptible. The objection that it was done upon motion at the trial, without previous notice, has no force. The statute seems clearly to intend, that the thing shall be done in the presence of the jury, and, of course, at the

time of the trial. The wisdom of such a provision may be well questioned, but the law is so.

To show that the count is a good one, the plaintiff's counsel have cited various authorities, some of which are misquoted, and the others (which have been all examined with the exception of 7 *Mass.* 31,) do not apply. The cases in 6 *T. R.* 606, and 3 (119) *Bos. and Pull.* 162, were both brought to recover the consideration *after* eviction by the representatives of the vendor. The case in 5 *John.* is where the vendor refused to convey agreeable to the terms of a verbal contract, and sold the land to another person. The case in 1 *Dall.* is misquoted. There is no question as to the general law. That an action for money had and received will lie to get back money paid upon a contract which the other party refuses so complying with, or which it has become impossible for the other party to execute, (*i. e.*) where the consideration has failed, or the contract is actually or virtually rescinded.

The first count of this declaration presents no such case. It does not aver the nature or extent of the hindrance occasioned by the demise of Smith & Lisa, or that it was removed, or that it had become impossible for the representatives of Bates ever to make a regular deed, &c. For aught appears, the time fixed for making the regular deed has not arrived. There is, therefore, no error in the judgment of the Circuit Court, either in the construction of the statute, or in applying the general principles of the law to the first count.

The second error insisted on, is the rejection of the certified copy of the deed from Bates to Smith & Lisa, as being the best evidence the nature of the case admitted of. The principle contended for is a sound one, but is most unreasonably invoked on this occasion. To admit secondary evidence, it must, under the circumstances, not only appear to be the *best*, but it must be the *best* legal evidence.

As the law then stood, it gave no authority to the Recorder to certify the truth of the copy, either from the original deed itself, or from the record of it. And nothing short of a sworn copy, (or what the law made equivalent to a sworn copy,) of the original deed could have been legally offered in evidence.

It is contended also, that the Court erred in rejecting the certified copies of the record of the Superior and Supreme Courts, and *Peake's Evi.*, p. 43, is relied on. The authority is directly against the position contended for. *Peake* says, "the whole record, and not a part only, must be exemplified or copied, in order that the Court may be in possession of the full effect of it; for a partial extract may bear a very different import from the whole taken together." Here it cannot be pretended that the "documents" offered, comprised the whole record. It was not the practice of the Courts to make up their records in that form. Such is the settled doctrine in relation to judgments at law; whether in equity cases the exemplification of *the decree* (120) *only* would or would not be sufficient, need not now be settled. Since in the case under consideration the instruction given by the Court below as to the second count, would have been equally correct if the decree had been read in evidence.

There was no evidence to prove that the consideration had failed, or that the contract had been virtually rescinded by the refusal or neglect of Bates or his representatives to execute it according to the terms agreed on. A clear *non sequeter*, to urge that no deed or title whatever can ever be made by the heirs and representatives of said Frederick Bates, or of said William Smith and Manuel Lisa, because the title to the lots may have been encumbered before or since the contract, or that Bates' representatives will not make a regular deed of sale so soon as the hindrance occasioned

by the demise of Smith and Lisa shall have been removed; because Bates himself and his representatives have neglected or refused to do so upon the application of the plaintiff, which, for aught appears, was before the time agreed on.

This view of the subject makes it unnecessary to decide whether a party can recover at all in this form of action, (money had and received,) where property at a fixed value, and not money, is the consideration, which may be well questioned. And also whether any other consideration than that set forth in a written contract can be shown by parol, which has been decided in various ways in different States, and even in the same State.

Upon the whole matter, the judgment of the Circuit Court is affirmed, with costs.

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(120) WARD v. THE STATE.

1. It is the duty of the grand jury to inquire diligently into all offences against law committed in their several counties.
2. In the exercise of their duties, they may cause such persons to come before them to give evidence, as they believe most likely to have a knowledge of any violation of the law.
3. A witness summoned to appear before the grand jury and give evidence, and refusing to tell "what person or persons have so bet on Faro, other than himself, and not naming himself," is liable to imprisonment.
4. It is the province of the Court to judge, whether any *direct answer* to the question propounded will furnish evidence against the witness.
5. The witness is not bound to answer, when his answer *may disclose a fact* which forms a necessary and essential link in the chain of testimony, sufficient to convict him of crime--and of this he is to judge.

ON APPLICATION for a *supersedeas*, on a writ of error from the Circuit Court of St. Louis county.

M'GIRK, C. J., delivered the opinion of the Court.

The case appears by the record to be, that at the late term of the Circuit Court for the county of St. Louis, the grand jury for said county caused a subpœna to be issued for said Ward, to appear before them and testify generally, without saying in what particular matter or cause he was to testify. Ward accordingly appeared, and was sworn to give evidence to the grand jury. He went before the grand jury to testify.

The first question asked by the foreman of the grand jury was this: "Do you know of any person or persons having bet at a faro table in this county, within the

last twelve months? To which the witness answered, "I do." The foreman then desired the witness to tell what person or persons have so bet, other than himself, and not naming himself. The witness declined answering, saying that he could not answer without implicating himself. Ward was then directed by the Court to answer the requirement of the grand jury, but not to name himself as a better; which he refused, alledging that to answer thus would implicate himself. Whereupon the Court committed him to prison, till he should consent to give the evidence required, and till the further order of the Court.

A writ of error is sued out, a supersedeas asked for.

(121) On this state of facts, several questions are made. The first in order is, that the grand jury have no right to interrogate a witness in this general way; but that an indictment should have been drawn up, charging some particular persons with crimes, and that the witness should then be required to give his testimony as to the matter of the indictment. Otherwise the grand jury may send for every person in the county, and inquire generally of each if he knows of any offences against law; and that this would be oppressive to witnesses, and dangerous to citizens.

The first answer to this is, that it is the duty of the grand jury to inquire diligently of all offences against law. Now if it should ever happen that a grand jury should determine to have summoned every person in the county, with a view to make the experiment, if perchance they might find out some offence, I have no doubt that it would be the duty of the Court to withhold its process and stop such a course. This would be an abuse of power.

The next answer to this is, that no such case appears by the record. I take this case to be an ordinary case, when perhaps the jury had probable cause to believe that some offences had been committed against law; and that so believing, they desired in discharge of their oaths, and of their duties to their country, to inquire; and how should they inquire? Not by going into the secret recesses of gamblers and gambling devices, to ask and seek information, but to send for persons who might, in their opinion, be most likely to possess evidence relating to these matters. It is a solemn and important duty that every citizen owes to his country, to give evidence in Courts of Justice against offenders against the peace and good order of the community. A grand jury should be considered trustworthy in this matter. They stand as a rampart between a malicious or incensed prosecution in case of life and death; no man can be brought to trial, on the lowest or the highest offences known to the law, unless the grand jury shall say so; yet they are not to be trusted with the power to send for witnesses, till some malignant prosecutor or some injured person shall cause an indictment to be sent up to them. This would strip them of their greatest utility, would convert them into a mere engine, to be acted upon by Circuit Attorneys or those who might choose to use them. This point is untenable.

The next objection is, that the act of the Legislature respecting witnesses, does not authorize the Court to imprison in this case; because it is conceived that the authority there given is only to be exercised when a witness refuses to give evidence (122) in some cause pending, and that here no cause could be said to be pending, as it does not appear that even an indictment was before the grand jury.

The language of the act of the General Assembly is, "that any person summoned as a witness in any cause depending in any Court of Record, or before Commissioners, Referees, or other persons appointed under the authority of the Court to take his deposition or testimony, and failing to attend, not having a reasonable excuse, may

be compelled by attachment to appear," &c., "and any person so summoned and attending, who shall refuse to give evidence, on oath or affirmation, shall be committed to prison by the Court or other person authorized to take his deposition or testimony, there to remain, &c., until he shall give such evidence." See *Rev. Code*, 796–7.

It is insisted by the counsel for Ward, that the true construction of this act is, that before a witness can come under its operation, the witness must be summoned before the Court or other person authorized to take testimony; and also that there *must* be a cause depending before such Court or person.

This construction is not a correct one; my reading of the act is, that if any person shall be summoned in any cause depending in any Court of Record; here I drop the words "in any cause depending in any Court of Record," and read, that if any person shall be summoned as a witness before commissioners, referees, or other persons appointed under the authority of the Court, to take his deposition or testimony, and shall refuse to give evidence, such person shall be committed to prison till he shall give such testimony, &c. I understand that a grand jury is a body known to the law, and that they act under the authority of the Court, and have a right to take testimony. According to this view, there is no error on this point.

The next inquiry is, was the witness right in refusing to answer the question on the ground that the answer would implicate himself? The record shows that the game at faro is played with cards, by one person as banker against any number of persons, each person playing for himself, without any aid from the others, against the banker; and that there is no common interest among those persons playing against the banker. Thus it appears that each player against the bank is separate and independent of all others. The inquiry made by the grand jury is, "tell who bet at the game of faro, not naming yourself." The answer of the witness is, (supposing him to be A.) that if I tell that B. C. and D. played, it will be either full or (123) partial evidence that I played. This is the whole argument of the case. An argument which I think is totally untenable in law and reason; and I am very clear that the witness is bound to answer the question propounded by the grand jury. Suppose A. should swear that on the 10th March, in the market house, he saw B. play at faro. Then A. is indicted for playing at faro on the 10th March, at the market house, and on the trial the prosecution should give in evidence, that on the trial of B., A. had sworn that on that day, at that place, he saw B. play; would any one pretend that the indictment is proved? The answer is obvious.

I understand the rule laid down by *Chief Justice Marshal*, in Burr's trial, 245, to be the true rule of law. It is this, that it is the province of the Court to judge whether any direct answer to the question that may be proposed will furnish evidence against the witness. If such answer may disclose a fact which forms a necessary and essential link in the chain of testimony, which would be sufficient to convict him of any crime, he is not bound to answer it, so as to furnish matter for that conviction. In such case the witness must himself judge what his answer will be, and if he say on his oath he cannot answer without accusing himself, he cannot be compelled to answer.

Both parties rely on this rule. Apply the rule to the case before the Court: The witness says he cannot answer without accusing himself of crime. The question is, who did you see betting at faro except yourself? It is believed that a direct answer in the negative to this would be, I saw no one bet at faro. This answer, I think, all will allow, does not accuse him; but suppose his answer must be, that he saw B.

bet at faro, can it not be true that though B. bet, yet he, the witness, did not? Does the mere fact that one man saw another commit crime, prove in law or reason that he who saw the crime committed was a participator? The only irresistible fact that is contained in it is, that he who saw the fact must have been in such position, with respect to the actors, that he could see or know the thing he swears to.

The rule then is, that the Court must judge whether a direct answer would furnish any matter for his conviction. If the witness answer that he saw no one bet, or that he saw B. and C. bet, he furnishes no matter that would be a necessary link in the chain of testimony, to convict him of betting at Faro.

(124) Suppose A. indicted for betting at Faro, what in law must be the evidence? The first link would be, that there was a Faro Bank, that there was a banker, and that A. and the banker did play at the game, and that A. and the banker did bet on the event of the game. These several links would form a chain of testimony sufficient to convict A. Now, though it be true, that without proof of the existence of the bank and the banker, no crime can be predicated thereon, yet it is equally true, that the facts that the bank and the banker both existed, forms no part of the offence of betting at Faro. The essential links are, that there was a betting on the game; these two must be coupled together, otherwise no offence can exist; and these two must be coupled with a third link, that is, that A. bet on the game. Then his offence is complete, entirely so, without naming who was the banker, or who else bet at the same time. Can it be pretended, that if it is said by A. that B. bet at the game, that on the trial of A. it must be proved that B. bet, before A. can be convicted?

I will answer that it cannot be so pretended. This I think most clearly shows, that there is nothing solid in the objection of the witness.

Let us put a case where a direct answer to a question would implicate a witness. Thus, did you set up and keep a Faro Table? Now, here the Court can clearly see, that if the answer be yes, the witness would subject himself to the penalty for setting up and keeping a Faro Table; and if the answer be no, he cannot so subject himself. But whether the answer be yes or no, is unknown to the Court; and in this case the witness must be the judge, whether his answer will be yes or no, and he may say he cannot answer this question without implicating himself. But in this case it is said, if the witness is bound to tell who bet at the game, without naming himself, then those persons who are named will be examined as to the fact, whether he bet; and if the witness is not compelled to name who did bet, then they will remain unknown to the grand jury, and cannot be examined whether the witness bet. I understand this doctrine to be grounded more on the fear of retaliation than on any sound principle of law. Will the law permit a man to keep offences and offenders a secret, lest the offenders should in their turn give evidence against him? I have looked into the cases cited at the bar, and I am unable to perceive any principle, in any of them, which ought to vary the foregoing opinion.

(125) The supersedeas is refused in this case: and also in the case, Kembly v. The State.

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BRUN v. DUMAY.

Where the error is in the judgment of the jury, on the facts, this Court cannot correct it—the party should move for a new trial, and except to the judgment of the Court overruling the motion.

WASH, J., delivered the opinion of the Court.

This was originally an action commenced before a Justice of the Peace, by Dumay *v.* Brun, on an account for work and labor, and goods sold and delivered, to the value of fourteen dollars and a half. Dumay got judgment before the Justice for ten dollars. From which judgment Brun appealed to the Circuit Court, where on a trial, *de novo*, Dumay got judgment for fourteen dollars, from which Brun has appealed to this Court. The account sued on, consists of several small items; one of which is, "To two tables, $8." The bill of exceptions show, that on the trial of this cause in the Circuit Court, the appellee gave no evidence in the cause to the Court (sitting as a jury) to substantiate and prove any other item, or charge, in his account, on file among the papers and records of this cause on which the plaintiff's action was brought, than the item and charge therein contained, of and for two tables; for which said tables, the plaintiff has charged in his said account only the sum of eight dollars; and "that in relation to the value of said tables, the plaintiff proved that each table was worth the sum of seven dollars," &c.

The error assigned and relied on is, that the judgment of the Circuit Court is given for fourteen dollars and entire costs; when it should have been given only for eight dollars, and have adjudged the costs in the Circuit Court against Dumay, agreeable to the provisions of the 13th sec. of "An act concerning costs," which subjects the plaintiff to the costs in the Circuit Court when he recovers less than the judgment before the Justice, &c. The evidence most clearly did not warrant the verdict or finding of the Court (sitting as a jury,) and the defendant should have moved for a new trial for that cause.

The error is in the judgment of the jury on the facts, and not in that of the Court on the law.

(126) Repeated decisions have settled that for such errors, the party injured, is without remedy in this Court. The judgment of the Circuit Court, is, therefore, affirmed, with costs. The decision on this point makes it unnecessary to look much into the question raised by Dumay's counsel, on his motion to dismiss the writ of error, growing out of the time and manner of taking the bill of exceptions. From what is said of the matter, the practice would seem very loose and irregular, and should not be countenanced.

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BEAN, ODEN AND RECTOR v. VALLE, JANIS AND VALLE.

1. Depositions filed but not preserved on the record, in a Chancery cause, cannot be used before the Supreme Court, on the trial of an appeal from the decree of the Circuit Court.
2. A plea of the statute of frauds, should expressly aver, that the contract concerning the land, was not in writing—and should contain an answer to all the other facts not expressly denied by it.
3. Where B. endorses a receiver's receipt "transferred" and signs the same and delivers it to K. with verbal instructions to deliver said receipt to a third person, upon the payment of a certain sum of money—it is not necessary for K. to do any act in writing; there is no act in writing left for him to do. The payment of the money and delivery of the certificate, constitute a valid agreement.
4. A specific performance of a contract will not be decreed, where it appears in evidence that the vendee had knowledge of a valuable mine upon it, and concealed the fact from the vendor.
5. Mere inadequacy of price, unless so great as to amount to evidence of fraud, is no ground for refusing a specific performance.
6. Payment of the purchase money, is not such a part performance of a contract for the sale of lands, as to take it out of the statute of frauds; nor is a mere taking possession of the lands, without the consent of the vendor, and without a declaration of the intention with which possession was given, such part performance.
7. Under the statute of frauds and perjuries, it is not necessary that the consideration of the agreement be in writing.

IN CHANCERY, appeal from the Circuit Court of Jefferson county.

M'GIRK, C. J., delivered the opinion of the Court.

Vallee, Janis & Valle, brought their bill for a specific performance of a contract, for the sale of a tract of land, against the defendants.

(127) The Court made a decree for the plaintiffs, Valle, Janis & Valle. Bean, Oden and Rector appealed to this Court. The error assigned is a general one, which is, that the decree is erroneous; under this assignment, we will only look at the decree, the bill, answer and exhibits. Before I proceed with the case, I will advert to one point made by the appellants, which came up as matter of practice, which is, that it appears by the record that the cause was submitted to the Circuit Court on the bill, answers, &c., and also on depositions filed. Certain depositions are now produced, and the appellants' counsel insists on the right to use them before this Court, as a part of the facts on which the decree is founded, or should have been founded; it is certified on these depositions that they were filed in the Circuit Court. It is objected that the depositions cannot now be used, because they are not preserved on the record as directed by the 42d section of the act to regulate proceedings in Chancery, (*Digest*, 645.) I am clearly of opinion the appellees are right in their objection. The 42d section of the act says, "it shall be the duty of every Court of Chancery (from whose decree an appeal lies) to cause the facts on which they found

their decree, fully to appear upon the records, either from the pleadings and decree itself, or from a state of the case agreed by the parties or their counsel, or from an examination of witness reduced to writing by the commissioner, or by a special verdict found by a jury empannelled for that purpose.

By the 28th section of the same act, the Court is required to appoint a commissioner, whose duty it shall be, says the section, to take testimony in any cause when required thereunto by the Court, and to report thereon, &c.

The 46th section of the same act says, "that in all appeals from a Court of Chancery, the Supreme Court shall examine the record, and take into consideration such facts *only* as appear by said record to be the facts upon which the sentence or decree appealed from was founded," &c.

These depositions appear to have been taken, not by the commissioner, but by a Justice of the Peace, and unless the facts appear upon the record by one of the four modes required by the 42d section, it is most clear to me they cannot be taken any notice of on an appeal.

I will now proceed to the facts contained in the pleadings of the parties, and those contained in the decree. It appears that on the third of July, 1824, one of the defendants, J. L. Bean, obtained from the receiver of public money, for the St. Louis (123) land district, the following receipt, (to-wit:)

"Receiver's Office, St. Louis, 3d July, 1824.

Received from Jonathan L. Bean, of St Louis city, Mo., the sum of one hundred dollars, being in full for W. half S. W. qr. of section No. 4, township No. 38, N. range No. 5 E. containing eighty acres, at the rate of $1 25 per acre, signed G. F. Strother, Receiver."

That immediately Bean, with others under his direction, entered on the land and dug for lead ore; that some lead was raised therefrom, but the prospect was not very good. That in the meantime Bean offered to sell the land to one Duncan for $100; that this operation continued till about the month of November in the same year, when Bean left the land and went to St. Louis, and appointed an agent to attend to the land. That before he went to St. Louis, he proposed to sell the land to the complainants, and that no agreement was then made; that mining was still carried on under the agent without much success. That sometime in the month of November in the same year, Bean wrote and delivered to one Keemle the following letter:

"Mr. A. Janis, Sir:—Since my arrival at this place, several applications have been made to me for the half quarter section of land adjoining your furnace, but owing to my having made a previous arrangement with you, I felt myself in honor bound to give you the preference. Mr. Keemle, who is on a visit to your mines, will therefore make the arrangement with you the same as if I were present. Esteem. yours, &c.

J. L. BEAN."

"If Mr. Janis is not present, Mr. Valle will please read the above. BEAN."

Which letter was written at St. Louis, and addressed on the outside to Valle, Janis & Valle, and together with the receipt of the Receiver above mentioned, delivered to one Charles Keemle, for the purpose of enabling him to dispose of the land to complainants, who then were, and for some time before had been, doing business under the name, firm and style of Valle, Janis & Valle. That at the time Bean delivered the letter and receipt to Keemle, he gave to him verbal directions to dispose of the land, and get therefor, if he could, $125, and if not, then to take $100; he also gave

to Keemle at the same time, a letter to Garraty, his agent, the contents of which were not proved.

That a few days thereafter Keemle gave the letter to Janis, one of the complainants, and proposed to sell the land to him for $125, which Janis refused to give, (129) stating that the land was of no value to him but for the wood on it, and of its contiguity to his own land, and that because the diggers on it were troublesome to him, he would buy it, and that he would not give more for it than the original price.

That Keemle endeavored to get more for the land, but being unable to do so, agreed to take $100, and delivered to said Janis the receipt of the Receiver, with the following endorsement thereon: "Transferred to Valle, Janis & Valle," and signed "J. L. Bean," which signature was admitted and proved to be in the hand writing of Bean, and the body of the transfer was alledged by the bill, and not denied by the answer, to be in the hand writing of Bean.

It was expressly admitted by the respondents' counsel to be so, by an admission signed by them of record.

It was also proved that Bean was fully paid the $100 for the land; and that Bean, when informed of the sale by Keemle, expressed himself well satisfied. It appears also that Bean afterwards sold the land to Oden, for what consideration does not appear, and that Oden soon thereafter sold one half thereof to Rector, for what consideration does not appear; and that both Oden and Rector, when they bought, knew of the sale to the complainants; and it also appears that immediately after the purchase by the complainants, they went into possession and went to mining, and soon discovered a valuable lead mine. Rector's answer denies fraud and combination, and insists on the statute of fraud, and also on the registry act; insists on inadequacy of price, and fraud and suppression of truth by complainants. Bean's answer insists on fraud in complainants in suppressing the truth, inadequacy of price, &c.

After Bean and Rector had answered, they moved for leave to file the pleas of the statute of frauds, which leave was refused.

This is not assigned for error, nor a point made in argument. I suppose whatever point might have been made on this matter is abandoned. At all events the pleas were clearly bad, for the same reason that I will hereafter show Oden's plea is bad; they are the same as Oden's in substance and form.

The Court ought to require, when its discretion is applied to, that the plea or amendment should be issuable in fact, which these pleas were not. They should also have been sworn to: *Cooper's Equity Pleading*, 231. Replications were put into the answers of Bean and Rector, and then the cause as to them was set for hearing. Oden filed a plea of the statute of frauds, which was demurred to, and the demurrer (130) sustained; he had leave to file an answer on terms, and having failed to do so, the bill was taken *pro confesso*, and set for hearing as to him also.

The matter of this demurrer was not agreed at the bar, nor is it all mentioned in the points made by the appellants' counsel. I will, however, as it fairly comes up, bestow some attention on it. This plea contains no averment that the contract was not in writing, &c.

It should expressly aver that the contract was not in writing. *Cooper's Equity Pleading*, 256, 225 seq.

This plea should also contain an answer to all the other parts not expressly denied by it.

It is true these reasons are not within the scope of those assigned by the demurrer, if I understand them rightly, but as the opinion of the Court is for the right party, that opinion must stand.

As to the residue of this case, the appellants' counsel have made and relied on the following points:

First. That taking all the testimony together, Keemle, as agent, executed no writing whatever.

Second. That the endorsement on the back of the Receiver's certificate, does not show what land is transferred, nor how much, nor for how much.

The third point of the defence against the decree is, that the complainants were guilty of unfairness, *suspressio veri* and *suggestio falsi*.

Fourth. That the price is greatly inadequate.

Fifth. That the statute of fraud covers the case, and therefore no specific performance can be decreed.

I will examine these points in the order in which I have stated them.

First, that Keemle did nothing in the name of Bean in writing. I admit that Keemle did no act in writing. The evidence is, and the admission is, that Bean wrote on the back of the Receiver's receipt transferred, and signed his name thereto, with the express intent that Keemle might deliver the receipt to complainants, if they would give for the land one hundred dollars. No act in writing was left for Keemle to perform; what he had to do could not be done in writing, to wit: simply to deliver the paper when he was satisfied as to the one hundred dollars. If this transfer has any effect at all, (which I will consider hereafter,) it was delivered to Keemle like an *escrow*, the delivery of which is always in *pais*. If this had been a deed duly drawn and signed, and sent to be be delivered by an agent to a particular person, provided he would pay before hand a certain sum of money, and on presentation (131) such person should pay the money—surely the delivery would be good, and the transaction good to pass the estate: so that there seems to me to be no difficulty as to this point, and the question as to agency presents no difficulty.

The second point to be considered is, whether there is sufficient connection between the receipt of the receiver, and the transfer on the back thereof to show what land or thing was transferred, and how much land, if any, and for what sum.

This transfer being on the back of the receipt does most satisfactorily satisfy my mind that it is the identical land mentioned in the receipt that is transferred. If the transfer had been on a separate piece of paper, without any other description than it has, then it would not be capable of itself to show what was transferred, but when a note, bond, or any other instrument, has the words "tranferred to A" endorsed thereon, no one can reasonably be at a loss to know to what thing these words apply.

The remaining branch of this objection is of grave import, and presents to my mind much difficulty, which is, whether the transfer should not show the consideration, which this does not show. No doubt if it were not for the Statute of Frauds, the consideration could be shown by parol testimony. I will defer the further consideration of this branch of the objection, till I come to consider the case under the objection which relates to the Statute of Frauds.

The third point is, that a specific performance ought not to be decreed, because the complainants suppressed their knowledge of a valuable lead mine, being contained in the land. Many authorities are cited to sustain this point. I admit that if

these things had been proved, the authorities would apply to a case that might arise, but which has not arisen in this case, and a solid objection might thus be formed against a specific execution of an agreement. The only evidence I can discover, looking that way, is that immediately after the sale to complainants, they took possession of the land and went to work thereon, and soon discovered a valuable lead mine.

That it was contiguous to their land and lead furnace; the circumstance of their contiguity might indeed enable them the more easily to discover the secret value of Bean's land, but it does not prove they did do so, though connected with the fact that they made a discovery soon after they began mining thereon. This discovery might well have been made without the least particular knowledge of any cer- (132) tain body of lead mineral being contained in the land. Whoever is at all acquainted with the operation of mining, must know that a man may live on land for half a century, may dig into it often and deep and discover nothing of value; another may thereafter, or he may himself thereafter, by one day's labor, discover a mine of great value. All the mining that was done on this land, before the complainants got it, was under the eye and inspection of Bean, from July till November, and then for a short time under the inspection of his agent; and the evidence is, that for all this time, even till the time of the complainants' purchase, nothing presenting the prospect of much profit had come to light; there is no evidence that the complainants were ever on the land, or had any communication with the agent or diggers belonging to Bean. This point appears to me to be wholly groundless.

The next point is, that the price was inadequate, the bargain a hard one, and that Chancery will not decree a specific performance where this is the case. This is true to a certain extent, but not true to the extent it must go to avail the appellants any thing in this case. The authorities cited to support this position are, Mostloch v. Buller, 10 *Vesey*. 292; *Sugden*, 170. I have not got 10 Vesey. I find in Sugden, under this head, a reference to this authority, but Sugden cites it expressly to show that mere inadequacy of price is not a sufficient ground to refuse a specific performance, (second American edition from fifth London, 189.) In this same edition, 189, which I suppose is the authority referred to by the counsel above, Sugden says, "that a Court of Equity cannot refuse to assist a vendor merely on account of the price being unreasonable, and a specific performance will certainly be enforced if the price was reasonable at the time of the contract made, however disproportionable it may become afterwards. If, however, a man be induced to give an unreasonable price for an estate, through the fraud or misrepresentation of the vendor, or by an industrious concealment of the defects in the estate, equity will not compel a performance.

The appellants to this point cites *Pow. on Con's*. 28, 152, to 59, and 200, 201 In this first citation, I find the doctrine laid down by Powell, "that inadequacy of price abstracted from all considerations, seems of itself (upon revision of the best authorities) to furnish no ground upon which a Court of Equity will set aside, or rather relieve a party to a contract; the law of England never having fixed any proportion (133) that the price should bear to the thing purchased. But if the cause of inequality of price be founded in circumstances from whence a Court of Equity may conclude that the consent to accept such was not free, or was conditional, being had under an impression that circumstances were otherwise than they were represented to the party accepting such unequal terms, in such case, if the party contracted with

be acquainted and take advantage thereof, it will furnish ground for a Court of Equity to set such contract aside;" and I should suppose much more to refuse its aid.

It seems also if the seller be in want of money, and the buyer knew this, and helped to enthrall him, equity will not help the buyer: same book, 156.

In the same book, 200 a 201, Mr. Powell says that "an agreement for the sale of an estate, which from the nature of it, when compared with the circumstances of either of the parties to it, furnishes decisive evidence of his being surprised, will be set aside in equity, although there be no surprise, fraud, or circumvention actually proved, and though a conveyance had been made pursuant thereto." The case of Wharwood *v.* Simpson, 2 *Vernon*, 183, is cited to support this position. The position taken by *Powell* is a strong one, and I have no doubt is supported by the case cited by him: but I doubt if the case cited by *Powell* is sound, either in principle or law; but suppose it to be correct, I cannot see that it is like the present case, according to the report given of it by *Mr. Powell*. It was a case where a steward had for many years been employed in the management of an estate; he articled with a person employed by the owner to become the purchaser at £15,000, and by the articles it was agreed, that he should either pay the whole money, or might return land to make up what he paid short in money of the £15,000, and he obtained a conveyance of a part at an under value, alledging that it was not material what sum was mentioned to be the consideration, and he had sold other parcels and paid money to the amount of £1,500 as the vendor appointed, and he now offered to return so much of the land as would make up the £15,000.

The Court, on a bill brought for that purpose, set aside the articles and the conveyance made to the vendor, except as to what had been sold; declaring that they looked upon the vendee but as an agent for the vendor, and one in whom he had reposed great trust and confidence, which the vendee had deceitfully abused; and that the articles themselves seemed to manifest surprise, the vendor having occasion to sell to raise money, and yet the articles left the vendee at liberty to pay as small a (134) sum as he pleased, and return what of the land he pleased to make up the value. *Mr. Powell* adds, "that the Court assumed a greater latitude in this case, because the time fixed by the articles at which he was to pay or return the land, had elapsed." As to the ground which the Court took in this case, that this steward was to be considered the agent, and that he had abused his trust, the case does not show at all that the vendee was in any respect the agent for the sale of the land; and it does show that for that purpose there was another person employed, yet because he was agent for the management of the estate, they make him agent for the sale also. I admit that this, on the part of the vendor, was a foolish contract; but that every bargain, which is not a wise or saving one, should of itself and for that reason furnish manifest ground of surprise, I deny. If this be law, the trading business of the country would ultimately fall into the hands of Courts of Chancery.

But in the case at bar, there was no trust reposed in the appellees; there is no evidence they had any special secret means of knowing that Bean was about to be surprised. Bean had mined on the land from July till November with others under him, and in that time he did not find this valuable lead mine. Bean says he bought the land with a hope that it contained lead, and doubtless the appellees hoped so too when they bought of Bean; but that they knew of any thing particularly valuable, there is no evidence. We have seen from *Sugden*, 189, that the price must be inade-

quate at the time, and it must be grossly so. In the case Gwyne *v.* Heath, 1 *Br. Ch. ca.* 9, cited by *Bridgman's Index*, p. 57, *Law* is said to have observed that to set aside a conveyance, there must be an inadequacy so strong, gross, and manifest, that it must be impossible to state it to a man of common sense, without producing an exclamation at the inadequacy. *Lord Eldon* (in Trecothe and Coles, 9 *Vesey*, 246, *Bridg. Index*, 57) is reported to have said, inadequacy of price does not depend upon giving *pretium affectionis*, from any peculiar motive beyond what another man would think the reasonable price; but unless the inadequacy of price is such as shocks the conscience, and amounts in itself to conclusive evidence of the fraud in the transaction, it is not a ground sufficient for refusing a specific performance. Accidental subsequent advantage made of a bargain, is no evidence of inadequacy. From a view of these authorities, I can see no ground to refuse a specific performance. If any evidence existed to show that the complainants were in possession of important (135) facts, and that they concealed them from the other party, then inadequacy of price might raise a strong presumption of fraud.

The next and last point is, that this case is within the statute of frauds. Our statute of frauds is in terms as to this particular matter, a copy of the English statute of 29 *Chas.* II.

By way of obviating this objection to the decree, the complainants rely on a part performance:

First. The payment of the purchase money.

Secondly. Being let into possession. The evidence is clear enough that the purchase money was paid. Whether payment of the purchase money is to be considered part performance, the authorities are contradictory. *Sugden*, 87, the cases are brought together, and I think the better authority is, that payment of the purchase money is no part performance: see *Lord Redesdale's* opinion in the case of Winan *v.* Cook, *Scho & Lefroy*, 22, 40.

The next inquiry is, whether being let into possession is such a part performance as takes the case out of the statute. It seems to be agreed by the English Chancellors, that a delivery of possession by the vendor to the vendee, shall be considered a part performance and take the case out of the statute of frauds: *Sugden*, 84. I think, however, that question cannot be discussed now; I can find no evidence that there was any delivery of possession. The evidence on this point is, that immediately after the sale as aforesaid, the complainants entered upon the possession of the land, and thenceforth continued to possess and occupy the same as owners, with the knowledge of said Bean, until July; that they soon made a discovery of lead; and that after the knowledge of the discovery came to Bean, he recognized the sale and expressed himself well satisfied, &c. Here was no delivery of possession; but there was a taking possession. Now if it appeared that Bean lived near the spot, and saw the complainants occupy, and made no objection, I should take it to be strong evidence that they took possession by his leave. The fact that they took it, and exercised ownership over it, and that Bean knew it, does not in my opinion amount to a delivery of possession; for aught appearing on the record, Bean might, at the time they took possession, and afterwards while they kept it, have lived in a distant country. I understand the possession should be delivered, and the object and reason of the delivery should be clearly made out, to have been in pursuance of the agreement, without which a British Chancery Court would not take possession to be (136) part performance. Neither of these points being sufficient to take the case

out of the statute of frauds, I will proceed to investigate the remaining point, which is, whether the agreement is itself sufficient to take the case out of the statute. The words of the act of the General Assembly of the Territory of Missouri, (which was in force when this transaction came into being,) are, that "no action shall be brought whereby to charge any executor or administrator upon any special promise, to answer for any debt or damages out of his own estate, or whereby to charge the defendant upon any agreement made in consideration of marriage, or any contract for the sale of lands, tenements or hereditaments, or any interest in or concerning them, or any lease thereof, &c., unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged, &c."

There is no provision in our statute of frauds similar to that section in the British statute, which respects the sale of goods. I think this Territorial act must govern this case, as it was in force at the time this transaction came into existence, though it was repealed in 1825. For whatever rights and liabilities the parties created or incurred, at the time of this transaction, those rights and liabilities still remain.

The statute says, "no action shall be brought on any contract for the sale of land." I do not so much consider this transaction a contract for the sale of land, as a contract whereby land is actually sold; it is, nevertheless, a case embraced by the statute; as it is a contract for an interest in land, I consider it an equitable sale, and equity raises a corresponding duty on the seller, to make the title good at law, unless the statute interposes to prevent it. I consider this transfer sufficiently certain as to the thing sold, and certain as to quantity of interest sold. It is not like the case in Sugden, much relied on by the appellants; that appears, in the text, to have been a case where an estate was sold for a certain number of years, purchased with a rent reserved, and the Court could not ascertain a portion of the rent; but Sugden himself cites by his reference a number of cases, *contra;* and note 1, at the bottom of the page, denies that the point as stated by Sugden, is to be found at all in the register. *Sugden* 65, 2d American edition.

But it is contended by the appellants' counsel, that this transfer or contract, should show the consideration as well as the thing to be done.

(137) There is much difficulty on this point. We will examine whether the consideration, cause or inducement to make an agreement or contract, is necessary to appear in writing or memorandum, to be signed by the party to be charged therewith.

On the one side it is contended that the consideration of the agreement must be in writing, as well as the thing to be done on the part of the seller of the land, and that in this case, the word "transferred" on the back of the receiver's receipt imports no consideration. In the identical clause in question, respecting a contract for the sale of land, I find no decision but on that part which says, no action shall be brought whereby to charge the defendant, upon any special promise, to answer for the debt, default or miscarriage of another, unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, &c. There have been several decisions. The first on this subject took place in 1804, in the Court of King's Bench in England, and reported in 5 *East.*, p. 10, by the name of Wayne *v.* Walters; the case appears to be a case where one person undertook in writing, to pay the debt of another, in consideration of forbearance to sue.

On the trial, the plaintiff gave in evidence the following note—"Messrs. Wayne & Co.: I will engage to pay you by half past 4 this day, fifty-six pounds and expenses on bill, that amount on Hall; signed, John Hall," dated, &c.

On this it was objected on the part of the defendant, that though the promise to pay the debt of another was in writing, yet as it did not express the consideration of the promise, the promise was void by the statute of frauds and perjuries. The Court of K. B. decided that the consideration must be in writing, as well as the special promise to pay the debt of another. 5 *E.*, p. 10.

The next decision relating to this subject was made in the year 1805, by the same Court, 6 *E. R.* 307; Egerton *v.* Mathews. This decision took place on the 17th section of the British statute, which says, "no contract for the sale of goods for the price of £10 or upwards, shall be good, unless the buyer shall accept part of the goods as earnest, or pay a part of the price; or unless some memorandum or note of the bargain be in writing, and signed by the party to be charged by such contract," &c. In this case the Court held, that a note or memorandum in writing of the bargain, was sufficient to satisfy the statute, without the consideration of that bargain (138) being in writing. This is, in principle, a decision contrary to the former. By a note appended to the case, Packard *v.* Richards, in 17 *Mass. R.* 144, it seems in 1821 the Court of K. B. unanimously affirmed the doctrine in the case Wayne *v.* Walters. These cases and the case of Goodman *v.* Chace, decided in 1816, are the only cases decided by the British Courts relating to the point under consideration. But in the latter case, the point was waved. In the United States, the first case on this subject is that of Sears *v.* Brink, in New York, in which the Court recognized the doctrine in the case of Wayne *v.* Walters, 3 *J. R.* 210. The next case is that of Leonard *v.* Vredenburgh, in which the same doctrine is recognized, but not without some expressions of dissatisfaction, 8 *J. R.* 37.

The doctrine in Wayne *v.* Walters was mentioned in the case of Violet *v.* Patterson, 5 *Cranch R.* 142, in which it was thought by the Court, that the doctrine did not apply to the case then before them, so that this last case amounts to nothing. The last American case I have found is that of Packard *v.* Richards, 17 *Mass. R.* 122. In this case, Ch. J. Parker reviews the whole of the foregoing cases, so far as they relate to the question, whether the consideration to pay the debt of another must be expressed in writing, as well as the promise.

In this case the doctrine in Wayne *v.* Walters, and the N. Y. cases, are overruled. The Court express their views at large, and with more reason to my mind than any other case I have seen.

The case of Wayne *v.* Walters was always denied by Lord Eldon to be law; see Vesey, jun., exparte, Gordon. In this case he decides expressly to the contrary of that case, 15 *V. jun.* 286.

Thus it appears that great authorities are arrayed on both sides of the question.

It has been said often, that the case of Wayne *v.* Walters was never well received in England, and that the great authority of the Court K. B. could not satisfy Lord Eldon, the British bar nor that great man Kent; see Leonard *v.* Vredenburgh, 8 *J. R.* 37. In this view of the subject, the question is still open to us, to receive that decision which in the opinion of the Court, shall best comport with the words and reason of the statute of frauds.

In the act of this State, as well as that of England, the title is, "An Act to prevent frauds and perjuries." Our act was passed in January, 1815. What might have been

the evils intended to be remedied by the English act, I cannot at this remote period (139) of time undertake to determine with much certainty. But from the dicta of judges and lawyers, it may be supposed, that frauds and perjuries had become so common and alarming in their consequences, that the Legislature thought it expedient to provide a remedy. The 4th section of the statute of 29 *Charles II.*, was adopted by our Legislature. At the same session, they adopted the common law, and some of the British statutes, down to the time of the 4th of *James* I. The statute of frauds being subsequent, was not in force, and the Legislature thinking it a good law, enacted it with a view of preventing frauds and perjuries. But I cannot think at that time, either frauds or perjuries were so alarming as to require such a signal legislation.

Our Legislature, no doubt, enacted the statute more with a view to the future times, more in reference to what frauds and perjuries might arise, than with an eye to those already existing. The moral history of this country at that day, will afford but little light on the reason of making the statute. But when the British statute was passed, we know the moral condition of that country was desperate, but what the particular evils were which drew forth the statute, I have never learned.

We know that England had not long emerged from the horrors of a dreadful civil war, and that it was then rapidly assuming a permanently reformed government, whence it may be expected that real estate was thought to be rapidly rising in value, and investments of money in real estate presented a greater prospect of profit than any thing else. In our own country, after our short war, in 1816–17 and 18, men seemed to think the possession and ownership of real estate, was the chief human good. When lands rose to enormous prices, men parted with their money freely, without much regard to quantity, for land. If then, such might have been the case in England, we may suppose the Legislature thought lands too valuable to be passed by mere verbal agreement, and I do suupose, also, that witnesses could be found, and were found, who would swear a man's real estate away on a pretended *parol* agreement. To prevent such frauds, and to close the door to such perjuries, I suppose the statute was made. That part of the statute which it is our business to consider, says, "no action shall be brought upon any contract for the sale of land, unless the agreement or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or his agent." From the peculiar manner in which (140) this statute is worded, I am led to the conclusion that it was not intended the whole of this agreement or contract on both sides, should be reduced to writing; when the statute speaks of the action to be brought on a contract for the sale of land, it no doubt embraces in its view both sale and consideration. But it forbids the action being brought, unless something else collateral should first be done, and that is, that the agreement to sell be in writing, or at least a note or memorandum should be made, and this agreement or note thereof is to be signed by the party to be charged therewith. This latter requisition convinces me, that the Legislature did not intend that all matters relating to the price, and time when to be paid, must necessarily be contained in this note, memorandum or agreement; otherwise they would have declared that both parties should sign the agreement or note. I take the word agreement here in its popular sense, without reference to the consideration or reason for making it. A note or memorandum is something less than the main subject in detail, and if the note only says, witness that A. agrees to sell to B., a piece of land in fee, and A. should sign this, I hold the statute is satisfied as to A., but if B. refuses to

take the land, then B. must show on suit for a specific performance, such note signed by B. In my opinion, this is all the statute requires, and the vendor and vendee must each look to his own part of the transaction in case of future difficulty.

The decree of the Circuit Court is affirmed, with costs.

WASH, J., dissenting.

I dissent from the opinion of the Court on two grounds, mainly:

First. The bill seeks the specific execution of a contract, made by Keemle as agent for Bean, and there appears to me no evidence, either of his authority to contract, or of a contract executed, &c.; and

Second. I think the true construction of the statute of frauds, &c., requires that the consideration should be expressed in writing as well as the contract, and in this case there appears to me neither contract nor consideration, so expressed as to take it out of the statute.

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(141) COCHRAN v. BIRD.

Where a trial was had and judgment given, before a Justice of the Peace, on the 27th December, at which time the defendant prayed an appeal, but did not enter into a recognizance until the 5th January following—held, that the party appealing should have notified the opposite party, in writing, of said appeal.

ERROR from the Jefferson Circuit Court.

Opinion of WASH, J.

Cochran sued Bird before a Justice of the Peace, and had judgment. Bird appealed to the Circuit Court, where, on motion, his appeal was dismissed for want of notice; to reverse which judgment, Bird presents the present writ.

The trial before the Justice took place on the 27th of December last and the transcript shows that the appeal was taken on the 5th of January thereafter. It appears from the record, that the appellant offered to prove in the Circuit Court, "by two witnesses, that on the day when said case was tried and judgment was rendered against said appellant, before said Justice, the said appellant had prayed an appeal to said Circuit Court, and offered to give bond and security, as by law required in said appeal; and thereupon moved said Circuit Court for a rule against said Justice, to show cause why the prayer of said appeal should not be entered on his docket, and a perfect transcript made out and certified to this Court;" which motion was overruled

by the Circuit Court. The 23d section of an act, establishing Justices' Courts, and regulating the collection of small debts, *R. C.*, p. 481, provides, "that in all cases of appeals not prayed for on the day the trial is had, the party appealing shall notify in writing, the opposite party or his agent, &c." For want of the notice required by this section, the appeal was dismissed.

It has been repeatedly settled, that the party praying an appeal, must tender his security at the time, or his prayer is to be disregarded. The appeal cannot be considered as taken or prayed for, in the sense contemplated by the statute, until the bond or recognizance be taken or tendered. But then it is the clear right of the party upon tendering the security required, to have his appeal entered on the docket as (142) taken on the day of trial. Why the Justice neglected or refused to do so, in the case under consideration, does not appear, and he should have been cited by the Circuit Court to make known the reasons of his neglect or refusal, or to make his transcript conform to the facts and whole truth of the case.

I think, therefore, that the judgment of the Circuit Court is erroneous, and should be reversed, and the cause remanded for further proceedings in conformity to this opinion. This is the only point I have deemed it necessary to notice.

Opinion of M'Girk, C. J.

In this case my opinion is, that the Court did right in dismissing the appeal for want of notice, on the record as it appeared in the Circuit Court, and that the judgment is affirmed. As to the motion made there to receive proof that the Justice had refused or neglected to grant the appeal, and take bond as required by law, I think the Court ought to have received the proof, and if it had been sufficient, to have granted a rule on the Justice, and the party in this way perhaps may bring up his case, if the Justice should not show good cause. But in the mean time, I hold the appeal on that record (as it was at the time the motion was made,) ought to have been, and was rightly dismissed.

Opinion of Tompkins, J.

Cochran sued Bird before a Justice of the Peace and had judgment, from which Bird appealed to the Circuit Court of Jefferson county. The trial before the Justice of the Peace took place on the 27th December last, and the appeal appears by the transcript to have been taken on the 5th day of January next ensuing. In the Circuit Court the cause was dismissed on motion of the appellee; and to reverse this judgment this writ of error is prosecuted. It appears on the transcript of the record of the Circuit Court, that the appellant offered evidence, that he prayed an appeal on the day of the trial of the cause before the Justice of the Peace; and then also offered to give such bond and security as might be required in the appeal; and then prayed the Court that as the transcript of the J. P. did not show that said prayer of appeal was made on the day of trial, the Court would grant a rule against such Justice, to show cause why the prayer of said appeal might not be entered on his docket, and a full and perfect transcript made out and certified to this (143) Court; which motion of the appellant the Court refused to grant, or to hear the evidence by which the appellant could establish the facts of his having prayed an appeal. The statute provides, that in certain cases within the jurisdiction of a Jus-

tice of the Peace, the person thinking himself aggrieved by the judgment of the Justice, may have liberty to appeal to the next Circuit Court; the party appealing, or some person for him, entering into a recognizance with sufficient security, in a sum sufficient to secure the debt or damages adjudged against him; and that in all cases of appeals not prayed for on the day of trial, the party appealing shall notify the opposite party in writing, &c.

The appellant contends that his appeal being prayed for on the day of trial, and the allowance of the appeal being a matter of course, it became his right to have the appellee in Court without a notice in writing. This seems unreasonable; he might have prayed an appeal which he never meant to perfect. But it further appears, that he offered to prove that bond with sufficient security was offered as by law required in said appeal.

It appears on the transcript that the appeal was not perfected till the eighth day after the trial. Of this the appellant could not have been ignorant, and as he did not offer to prove that the appeal was perfected on the day of trial, and that the entry was wrong, it is but reasonable to suppose it was perfected when it purports so to be. This the appellant knew, and of this the law presumes the appellee to be uninformed. It is then unreasonable that the appellee should be required to take notice of the appeal. The appellant should have given notice. But it is asked, is he to lose his right by the negligence of the J. P.? The answer is plain, he had lost his right of having the appellee in Court without written notice. And it is unjust that the appellee should suffer by an act of the Justice, which by law can affect only the appellant. The Circuit Court, in my opinion, did right to refuse the *mandamus*, and the cause was rightly dismissed. The plaintiff in error does not insist that the Circuit Court erred in refusing to hear the evidence, for the purpose of enabling him to obtain a *certiorari*, on a suggestion of diminution of record; therefore I will say nothing on that point.

The judgment is affirmed, Judge M'Girk concurring with me in opinion that the Circuit Court committed no error.

(144) THEOTESTE, (*alias* CATICHE,) *v.* CHOUTEAU.

The ordinance of 1787, which provides that "neither slavery nor involuntary servitude shall exist in the N. W. Territory," does not impair any rights *then* existing—and negroes born and held as slaves, previous to the passage of said ordinance, are not entitled to their freedom by reason thereof.

APPEAL from St. Louis Circuit Court.

TOMPKINS, J., delivered the opinion of the Court.*

This was an action of trespass, &c., in the form prescribed by law, to try the right to freedom; plea, not guilty; verdict and judgment for the defendant. On the trial of this cause, it was proved that the plaintiff was born in the year 1782, at Prairie du Rocher in that part of the late North-Western Territory which now forms a part of the State of Illinois; that she was born a slave in the year 1782 as aforesaid, and there remained as such till about the year 1809, when she was brought to St. Louis, in the then Territory of Missouri, and sold as a slave; and that the present defendant derives title through one Manuel Lisa, who purchased her of a person who held her in slavery in Illinois, and derived his title from the original owner. The plaintiff prayed the Court to instruct the jury, "that if they believed from the evidence, that the plaintiff was born a slave in the late North-Western Territory of the United States, now State of Illinois, in the year 1782, and was held there as a slave since 13th July, 1787, and has been since held as a slave, they ought to find for the plaintiff." These instructions were refused, and the jury were instructed, that on such evidence they ought to find for the defendant.

The clause of the ordinance relied on by the plaintiff, reads in these words:—"There shall be neither slavery nor involuntary servitude in said Territory, otherwise than for the punishment of crimes, whereof the party shall have been duly convicted."

This article, it is contended by the defendant, does not operate to divest vested rights, first, because the ordinance provides that the inhabitants of the Territory shall be protected in the preservation of their rights and property; and by the act of ces-
(145) sion, it is stipulated, that the inhabitants shall be protected in the enjoyment of their rights and liberties: 1 vol. *Laws U. S.*, 473.

This Court decided in the case of John Merry *v.* Tiffin and Menard, that a person born in the N. W. Territory since the ordinance of 1787, was free, although the mother might have been a slave. The opinion has these words, "the act of cession of the State of Virginia provides that the inhabitants shall be protected in their rights and liberties. This provision is completely satisfied by securing to them such rights as they *then* had," viz: at the time of the making of the act of cession by the State of Virginia. John Merry was declared free because he was born after it had been provided by the ordinance, that neither slavery nor involuntary servitude should

*Absent, M'Girk, C. J.

exist in the territory; because, no right to property could vest before such property had existence.

The person holding John Merry in slavery, lost no right which had been secured to him by the State of Virginia. But here is a different case. The defendant claims to hold the plaintiff in slavery, through another whose right was vested as early as the year 1782. It appears that either the general terms "neither slavery nor involuntary servitude shall exist in the territory," must yield to the provision in the act of cession, or that the provision of that act must be violated. This it cannot be supposed Congress intended to do. The judgment of the Circuit Court ought then in my opinion to be affirmed.

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Collier v. Easton and Russell.

A judgment at law, obtained by fraud, may be set aside in Chancery.

APPEAL in Chancery from the Circuit Court of St. Louis county.

M'Girk, C. J., delivered the opinion of the Court.

The bill sets forth that Easton sued one Prospect K. Robbins in the Lincoln Circuit Court in two suits. That Collier became the special bail of Robbins in one of them only. That Easton having recovered judgment against Robbins in both cases, (146) sued out executions, which were returned *nulla bona*, and body of defendant not found. That Easton afterwards commenced two actions of debt against Collier in St. Charles Circuit Court, alledging a recognizance and breach in both cases. That the first of said suits against Collier, he alledges is the only one in which he entered into a recognizance. Easton recovered judgment at St. Charles and made the money. That in the second suit so brought against Collier, the judgment and execution against Robbins were set forth, and also a recognizance of Collier as special bail, which he alledges he never entered into, and that there is not among the records of the Lincoln Circuit Court, any record of such recognizance. That he, Collier, and the Clerk of the Lincoln Circuit Court have examined the records, and can find no such recognizance; that to the last mentioned suit he, Collier, pleaded the plea *nul tiel* record of the judgment, *nul tiel* record of the execution, and *nul tiel* record of the recognizance; that issues were made up and tried on these pleas in the St. Louis Circuit Court; that on the trial the plaintiff produced a transcript certified by the Clerk of the Lincoln Circuit Court, under the seal of the Court, upon which the Court found the issues for the plaintiffs. The complainant avers that the

recognizance set forth in the transcript is the same given by him in the other suit against Robbins; that the Clerk inserted the same by mistake, or that Easton made up the transcript out of parts of the two cases against Robbins. This bill prays a discovery from Easton as to the matters therein contained, prays for an injunction against the judgment at Law, and general relief. To this bill there is a demurrer for want of equity. The Circuit Court sustained the demurrer and dismissed the bill; to reverse that decree the cause is brought to this Court.

The errors assigned are, that the decree should have been for the complainant, &c. I will consider the objections made by the counsel for Easton to the equity of the bill.

The first and chief one is, that by this bill Collier seeks to re-try the issue of the *nul tiel* record.

Second. That this matter having been once tried at law by a Court of competent jurisdiction, cannot be re-examined in Chancery, even supposing the Chancery Court had jurisdiction of the subject matter.

Third. Though it may be that a Court of Chancery would grant a new trial, to be had in a Court of Law, on a very extraordinary case of surprise, accident or mistake, yet as nothing of that kind is here shown, no relief ought to be granted.

(147) Fourth. No facts are alledged in the bill which were not in the knowledge of the complainants, at the time of the trial of the issue at law.

Many authorities are cited to show that where a defendant neglects to set up matter in his defence at law, he cannot afterwards make such matter the basis of a suit in equity, unless there was some accident or fraud of which the party could not avail himself at law. 4 *Johns. R.* 570; 2 *J. C. R.* 554; 3 *D.* 357.

The second case cited is the case of a surety who sought relief against the creditor. The principle laid down in the case is, that where a surety has been sued at law, and makes his defence, which is overruled as insufficient, he cannot afterwards on the same facts obtain relief in equity.

The third case, is a case which decides this principle, that after a trial at law the party cannot have the aid of a Court of Equity, unless he can impeach the justice of the verdict, by facts or grounds of which he could not avail himself, or was prevented doing it by fraud or accident, or the act of the opposite party, without any negligence on his part. The first case cited I do not recollect: I have not the book before me, but I think it contains nothing more than the general principles as stated above by Easton's counsel.

The foregoing doctrine is admitted by Collier's counsel. But it is insisted by him that in this case the facts that one recognizance was by mistake of the Clerk put in the transcript where none existed, or that Easton took parts of two records to make the one he gave in evidence against Collier were not tried at law, nor could they be tried under the plea of *nul tiel* record. I am of opinion that the complainant is entitled to the relief he asks.

In this case, the complainant could not, by the forms of law, have any other plea than he had, and he could not retract the certificate of the Clerk. But in Chancery it is otherwise. In Chancery, a judgment may be set aside for being obtained by fraud. It may be perpetually enjoined, because predicated on fraud, and if this fraud was set up as a defence in a Court of law, and adjudged against the party, then he would be concluded, but if the fraud could not be set up at law, then the party may set it up in Chancery as the basis of relief; this doctrine, I think, is sustained by the

cases cited by Easton's counsel, to a considerable extent; at all events, it is the doctrine of the books on the subject. I have no doubt that Collier's case is within this principle.

(148) The decree is reversed with costs, and the cause is sent back to the Circuit Court for a new trial.

STROTHER v. CHRISTY.

1. A defective description in a confirmation of a tract of land, must be supplied in the same way that defective descriptions are supplied in other instruments.
2. A copy of a deed made and recorded in 1816, and certified by the ex-officio recorder, will not be received as evidence in any cause depending, the law not authorizing the recorder to make out and certify copies.

ERROR to St. Louis Circuit Court.

TOMPKINS, J., delivered the opinion of the Court.*

This is an action of ejectment brought by Strother, to obtain the possession of land in the vicinity of St. Louis, from Christy. On the trial of the cause, the plaintiff offered in evidence, a copy of a confirmation of a tract of land, four by twenty arpents, lying in form of a right angled parallelogram, within which was contained the land for which the action was brought; this being a certified copy of the confirmation, was admitted by the Court to be read; but in the confirmation of which a copy was read, a reference was made to book C, page 339, in the Recorder's office, for the boundaries of the land, confirmed in the following words, viz: "and as respects the four arpents agreeably to a reserve made in a sale from Joseph Brazeau to Louis Labeaume in book C, page 339 of the Recorder's office." The plaintiff then offered in evidence, the certified copy of the deed of sale from Brazeau to L. Labeaume referred to as aforesaid, and it was rejected by the Court. The plaintiff then produced a writing, purporting to be a copy of a deed formerly made by Joseph Brazeau to said Pierre Chouteau, for a tract of land contended to be the land sued for. This was rejected by the Court.

The plaintiff then asked the Court for leave to take a non-suit, and the Court directed a non-suit to be entered accordingly; the plaintiff then moved the Court to set (149) aside the non-suit and grant a new trial. The Court overruled the motion.

*Absent, Judge Wash.

It is assigned for error—

First. That the above mentioned copy of the entry in the book of land titles, marked C, page 339, was rejected.

Second. That the above mentioned copy of a deed from Brazeau to Chouteau was rejected.

First. The copy of the confirmation above mentioned was admitted as evidence by authority of an act of the Assembly, which provides, that "a certified copy of any confirmation had before the Board of Commissioners, for the adjustment of land claims within the State, or before the Recorder of land titles, by the said Recorder, or by the person having the custody of the books and papers containing such confirmation, &c., shall be received in evidence." The paper rejected by the Court, and for the rejection of which the first error is assigned, contains a description of the land, of the confirmation of which, evidence has been received. The statutory provision is, in the opinion of the Court, to be strictly construed; and if the plaintiff had need of any evidence not contained in the confirmation, he should have produced such evidence as would have been admissible at common law.

Most certainly the deed of Brazeau to Chouteau, was no part of the confirmation. These confirmations are acts of officers known to the law, the registers of which are necessarily confined to one place, and the law has made the certified copy of such confirmation evidence, because the public convenience requires that the books containing the registers should be kept at one place, and because it would be inconvenient to permit every person to have access to books for the purpose of taking copies. If the certified copy of the confirmation did not contain a sufficient description of the land confirmed, it is either the fault of the confirmee or his misfortune, and he must supply the defect in the same way a defective description must be supplied in any other instrument.

Second. The writing for the rejection of which the second assignment of errors is made, is certified by the Clerk of the Circuit Court, and ex-officio Recorder for the county of St. Louis, to be a true copy from the record of a deed by Joseph Brazeau to Louis Labeaume, (Pierre Chouteau meant,) as found in his office. The loss of the original had been satisfactorily proved. The copy bears the date of 26th July, 1816.

(150) The law in force in 1816, provided that deeds made and executed in the (then) Territory, of or concerning any lands, &c., or whereby the same may be affected in law or equity, shall be acknowledged by one of the grantors, &c., or proved by one or more of the subscribing witnesses before one of the judges of the Supreme Court, (other officers were also authorized to take acknowledgments or proofs,) and recorded within three months, in the county in which such lands are situated, or the same shall be void against subsequent purchasers, recording the said deeds, &c., within the time prescribed by this section. The only object of the Legislature in this provision of the law, seems to be to impose a penalty on a person who, having become a purchaser, by his negligence or fraud, puts it in the power of his vendor to injure an innocent and subsequent purchaser. If the Legislature had meant to introduce a new rule of evidence, it certainly would have prescribed the rule, and not have left it to the Courts to guess at. The original being lost, the plaintiff should have produced the next best legal evidence.

The execution of the original has not been proved, and there is no legal evidence that the deed on record is a copy of any thing that ever had existence.

But even if the deed on record could be read in evidence on the trial of any cause pending in our Courts of law, (which is by no means the case,) the Clerk of the Circuit Court and ex-officio Recorder is not, by the then existing, law authorized to make out certified copies.

The judgment of the Circuit Court is affirmed.

Decisions of the Supreme Court of Missouri.

FAYETTE DISTRICT, MAY TERM, 1829.

Ramsay v. Barcroft.

To support an action of detinue, the plaintiff must have a property either general or special in the chattel; if special, it must grow out of an actual possession or be coupled with an interest therein. (Note *a*.)

ON APPEAL from the Cole Circuit Court.

Wash, J., delivered the opinion of the Court.

This is an action of detinue brought by Ramsay against Barcroft, to recover a negro woman slave. The declaration contains two counts. The first is a general count, the second is special. The defendant pleaded the general issue to the first count, and demurred to the second, and had his demurrer sustained. Upon the trial of the issue joined on the first count, the facts as preserved by a bill of exceptions, are substantially those set out in the second count; and appear to be, that one "Albert Boone being the owner of a certain negro woman slave, in the year 1827, delivered her into the possession of the defendant, and hired her to him for and until the 25th of Dec., 1827, and no longer—that after the expiration of the term for which the defendant had hired her, on the first day of January, 1828, whilst the slave was still in the possession of the defendant, the owner hired her to the plaintiff for and until the 25th of December, 1828, for a full, adequate and valuable consideration, to be paid by the plaintiff; that Boone notified the defendant that he had hired said slave to the plaintiff, and requested him to deliver her up to the plaintiff, who afterwards, on the 1st day of January, 1828, demanded said slave of the defendant, who refused to give her up, &c."

(152) Upon this state of facts, the defendant moved the Court to instruct the jury "that the plaintiff had not shown such a property in the negro slave in question, as

would authorize a recovery in this action;" which instructions were given and excepted to, and which are now assigned for error.

The counsel on both sides have discovered much ingenuity and research. The general rule of law applicable to the case is, "that the plaintiff must have a property either general or special in the chattel, and the actual possession or the right to immediate possession;" 1 *Chit. Pl.* 151. The absolute or general property creates a constructive possession, which will support this action. Special property, growing out of actual possession variously modified, is also sufficient in most cases to maintain the action. It is also held in one case, that special property accompanied with an interest in the goods, without actual possession, will be sufficient. In the case of Fowler *v.* Down, 1 *Bos. & Pull.* 47, Eyre, C. J., says: "It is not true, that in cases of special property, the party must once have had possession, in order to maintain trover, for a factor to whom goods have been consigned, and who has never received them, may maintain such an action." The case then under consideration, was not a case of special property. This dictum, however, is recognized as law by *Chitty*, 1 vol. p. 152, and by Serjeant Williams in his notes to *Saunders*, 476, with the modification above stated; that the special property must be accompanied by an interest in the goods. In the case of Coxe and others *v.* Harden and others, 4 *East.* 210, it is held that the endorsement of the bill of lading by the consignors to their agent, to enable him to take possession of the goods on account of the consignors, would not enable him to sue in his own name, &c. In the case of Hotchkiss, sheriff, *v.* McVicker, 12 *John. Rep.* 401, it is laid down that the special property of a carrier, bailee, or a person finding a chattel, arises alone from possession. The true law, it is believed, will be found to be this, that the special property must grow out of an actual possession, or be coupled with an interest in the chattel. As where goods are shipped or forwarded to the order and at the risk of the consignee, or are delivered to a carrier, baillee, &c., to be delivered to a third person. In the case of Hotchkiss *v.* McVicker, above referred to in 12 *John.*, the consideration whether the person claiming to sue by virtue of special property, be answerable over, is held to be a "decisive criterion of the right to sue." The doctrine in *Bac.* vol. 5, p. 260, and the cases there given, go to establish this criterion.

(153) In the case at bar, it cannot be contended that Ramsay was liable to Boone for the property in the slave, or can be held to pay the price contracted to be paid for her services; hiring is a species of bailment, the rights and liabilities of which flow from possession.

The judgment of the Circuit Court upon the demurrer to the second count, and in giving the instructions prayed for, was, therefore correct, and is affirmed, with costs.

(a.) See Chouteau and Keizer *v.* Hope, 7 Mo. R., p. 428.

GOODALL v. HARRISON.

A declaration containing two counts, with one conclusion of damages, and the damages laid thus, $1000—held, that the conclusion stands for the whole declaration, and being bad, both counts are bad.

ERROR from the Circuit Court of Cole county.

M'GIRK, C. J., delivered the opinion of the Court.

Harrison brought an action of assault and battery against Goodall. The first plea is *son assault demesne;* the second plea is that the plaintiff was about to enter the defendant's shop violently, and to prevent that, he committed the assault, doing no unnecessary harm.

The third plea is, that *molliter manus imposuit*, &c.

The fourth plea is, that plaintiff was about violently entering the house of defendant with a drawn knife, and to prevent himself from being stabbed, he flagellated him, &c.

Upon the three first pleas issues are taken to the country, and to the fourth there is a demurrer. On these issues the jury found the following verdict, to wit: "That the defendant is guilty of the several trespasses, and assaults and batteries, complained of by him, the plaintiff, and they do assess the damages sustained by him thereby, to fifty-one dollars, besides costs." Upon this verdict the defendant moved the Court to grant a new trial, which was refused; and he then made a motion in arrest of judgment, for the following reasons:

First. Because the declaration is insufficient.

Second. The replication is insufficient, &c.

The errors assigned and relied on are, first, a general assignment. Secondly. That (154) the Court erred in giving judgment on the demurrer against defendant.

Third. That the Court erred in giving judgment for costs generally, without saying for how much.

The demurrer to the fourth plea was sustained. One of the causes for a new trial is, that the verdict is against law.

The points made in argument by the plaintiff in error, are, first, that though it be true that his fourth plea which is demurred to is bad, yet the plaintiff's declaration is bad, in this that the damages are laid thus, $1000. Some other objections are taken to the declaration, none of which will be noticed but the above one named.

It is insisted by the counsel for the plaintiff that the damages in the declaration should be expressed by words, and that it is not sufficient in a declaration to make the mark used by some accountants to express the sign of dollars; here this mark is used and prefixed to the number one thousand in figures. To prove this position correct, the counsel relies on the statute of this State, *Rev. Code*, 273. By the 16th section of the act it is declared, "all proceedings whatsoever in any Court of this State, shall be in the English tongue only, and shall be printed or written in a good,

strong, legible hand and characters, in words at length and not abbreviated, except such abbreviations as are now commonly used in the English language; but it shall be lawful to express numbers by figures," &c. It is believed that this statute covers this case; the character here used to express dollars is not a character known to the English language, as a character to express a word or a part of a word; but that is not material; the meaning of the act is, that the characters used to express words or numbers must be strong, but the words expressed must be written at length except numbers, &c.; here the number one thousand is well expressed by figures, but the word dollars is wanting, and it would be idle to contend that this sign is an abbreviation of any word. The declaration in this particular is bad. But in this case the fourth plea is also bad, but the judgment on the demurrer should have been for the defendant. There are two counts in the declaration, and the first has no conclusion of damages, and the conclusion in the second count meant and does stand for the conclusion of damages for the whole declaration, otherwise the judgment for the plaintiff on demurrer ought to stand. For it is argued by Harrison's counsel, and rightly too, that to consider this demurrer to act like a demurrer in any other case, it (155) would be considered as a demurrer to the whole declaration; and in that case if there be one good count in the declaration, where the demurrer is to the whole, the demurrer must be overruled. But there being but one conclusion of damages in this case to apply to both counts, and that conclusion being bad, both counts are bad. This point being ruled for the plaintiff in error, it is unnecessary to decide the other material point relating to the verdict of the jury, more especially as we are not all clear what the law is on that objection.

The judgment is reversed and sent back for a new trial; leave to amend in the Court below is to be allowed.

TRAMELL v. ADAM, A BLACK MAN.

1. In an action of trespass, &c., to recover freedom, the plaintiff is not entitled to damages after the institution of suit.
2. The action may be sustained without the plaintiff filing his petition and obtaining leave of the Court to sue—these are benefits intended for the plaintiff, and which he may waive.
3. An averment by the plaintiff "that he was and is a free man, and that he is holden as a slave," is sufficient under the statute, if proved, to sustain the action.
4. In every civil case, where a party intends to rely on the statute of limitations, he must plead it, otherwise he cannot avail himself of its provisions.

M'GIRK, C. J., delivered the opinion of the Court.

This was an action of trespass and assault and battery and false imprisonment, instituted by Adam against Finley and Tramell to recover his freedom. The declaration contains one count charging an assault and battery and false imprisonment, and alledges that at the time when, &c., he was and still is a free person, and that the defendants held and still do hold and detain him in slavery. The defendants pleaded not guilty. Upon which plea issue was taken and tried. Verdict and judgment for the plaintiff, appellee in this Court. To reverse this judgment, the defendant, Tramell, prosecutes his appeal.

Before the examination of the witnesses, the defendant moved the Court to dis- (156) miss the suit from the docket, because no petition for leave to sue had been filed; and because no leave had been given.

It was in evidence on the trial that Tramell, the appellant, in the year 1810, resided at the United States Saline in the State of Illinois; and that the appellee, who is a negro, lived there also in the possession of the appellant, and as his slave: that Tramell continued to reside at the said Saline till the year 1817, (Adam being still in his possession,) when he removed to the Territory (now State) of Missouri; and that since that time the appellee has been in the possession of said Tramell & Finley as a slave. No other evidence was given on either side.

It is assigned for error:

First. That the Court refused to dismiss the suit from the docket on motion of the appellant, made before the jury was sworn.

Second. Because Court refused to instruct the jury, that on the evidence they could not find a verdict for the appellee.

Third. Because the Court refused to instruct the jury, that unless they found an assault and battery and false imprisonment of the plaintiff, by the defendant, they must find for the defendant.

Fourth. That the Court refused to instruct the jury, that if the plaintiff's cause of action accrued, which was the last detainer, more than two years before the bringing this action, they must find for the defendant, unless they find that the plaintiff's case comes within some of the exceptions in the proviso of the statute of limitations.

Fifth. That the Court instructed the jury that if they found from the evidence that the plaintiff brought his slave into any part of the State of Illinois with the intent to reside and did reside as a permanent citizen, and there kept him, it amounted to a contract between the master and the slave, that the slave should be free, and that he accordingly became free.

Sixth. That the Court refused to instruct the jury that they could not find any damages for any assault and battery and imprisonment, happening since the commencement of this action, and that the Court gave the contrary instruction.

Seventh. That it appears by the record, that in this case there was no petition filed and leave given by the Court to sue, and on this the Court refused to arrest the judgment.

I will examine the sixth error first, which is, that the Court allowed the jury to assess damages down to the time of the trial. This we conceive is clearly erroneous, (157) and that the judgment as respects the damages alone ought to be reversed.

I will consider the first and seventh errors together, which relates to the petition and leave to be given by the Court, to persons claiming freedom before the suit can be instituted. The act of the Legislature passed the 30th December, 1824, provides by the first section, that persons held in slavery may petition the Court for leave to sue, and that if the Court think a good ground for freedom is shown, they will give leave, order process free of costs, and take steps to secure to the petitioner sufficient liberty to attend counsel and Court, &c. The third section gives the form of the action, which is assault and battery and false imprisonment; and says that the declaration shall contain an averment that at the time of committing the grievances he was and still is free. The fourth section requires the plaintiff to establish his freedom, and then says, "that if the issue be found for the plaintiff, the Court shall give judgment of liberation." It is argued that unless there is a petition and leave given to sue, that the judgment of liberation cannot be given, though a common law judgment for damages alone might be given. My view of this objection is this, that the petition and leave to sue are benefits intended for the plaintiff, and that he may waive them and rely on his own resources, or the goodness of the defendant and the common law powers of the Court to protect him, and that he may, if he avers in his declaration that he was free and still is free, have the statute judgment: there is, therefore, no error on this point.

I will consider the second, third, and fifth errors together, as I consider the question of the plaintiff's right under the ordinance of Congress of 1787, alone is involved in them all. One question is, whether an actual assault, battery and imprisonment must be proved. If this were purely a suit at common law, and it were proved that the defendant held and exercised mere acts of ownership and authority over the plaintiff, as a slave, I should think the proof is sufficient to sustain the charge, and that in this case, the plaintiff having averred that he was and is a free man, and that he is holden as a slave, is enough under the statute, if proved, to sustain the action, and to warrant the Court to consider this a proceeding under the statute, and to give the judgment of liberation: the defendant has all the benefit which the statute provided for him. As to the residue of these errors, the matter has often been decided by this Court for appellee.

(158) As to the fourth point, I am of opinion that in every case, except in a criminal case, the statute of limitations must be pleaded; that nothing having been done, no question can be made on it.

On the sixth error the judgment is reversed as to damages alone, and that the cause is sent back to the Circuit Court to inquire of those damages, and that the residue of the judgment is affirmed.

WASH, J., dissenting.

I dissent from the opinion above given, on the ground that the plaintiff could recover as at common law only; and at common law, the judgment for damages is erroneous. To be entitled to the judgment of liberation, the petition should be filed agreeably to the provisions of the statute.

HINCH *v.* THE STATE.

1. An indictment against H. for perjury, committed upon the trial of P. for larceny, should charge or show that the larceny for which P. was tried, was either made felony by statute, or was such as at common law amounted to felony.
2. It should be alledged that the facts sworn to by H., and in which the perjury is charged to have been committed, were material upon the trial of P. (Note *a*.)

ON ERROR from Howard Circuit Court.

WASH, J., delivered the opinion of the Court.

Hinch was convicted of perjury at the last term of the Howard Circuit Court, sentenced to receive twenty-five stripes, fined fifty dollars, and disqualified from being a witness, &c., agreeably to the provisions of the 56th section of the act concerning crimes and punishment: *R. C.* p. 299. Various errors are assigned, only two of which will be now considered, without regard to the order in which they stand.

First. That the indictment does not show what species of larceny was charged against Patrick, upon the trial for which the perjury is alledged to have been committed by Hinch; or that the same was a felony, either at common law or by the statute.

(159) Second. That it is not sufficiently alledged in the indictment against Hinch, that the facts sworn to, and in which the perjury is charged to have been committed, were material upon the trial between the State and Patrick.

The indictment charges that the perjury was committed upon the trial of issues joined between the State of Missouri and one William Patrick, upon an indictment against said Patrick "for larceny, and for feloniously marking a hog, and feloniously

altering the marks of hogs, with an intention of stealing the same," &c. "And that at and upon the trial of said issues, one Uriah Hinch did then and there, to wit: on the day and year aforesaid, at the county aforesaid, at the Court aforesaid, appear, and was produced as a witness for and on behalf of the said Patrick, against the said State of Missouri; and the said Hinch was then and there duly sworn, and did then and there take his corporal oath, as such witness as aforesaid, before the said Court, that the evidence that he, the said Uriah, should give to the Court and jury, sworn between the said State and the said William Patrick, should be the truth, the whole truth, and nothing but the truth, (the said Court then and there having competent authority to administer the said oath to the said Uriah in that behalf,) and the said Uriah being so sworn as aforesaid, *it then and there became and was material to inquire*," &c.

The statute above referred to, *R. C.* p. 299, sec. 56, provides "that if any person shall wilfully and corruptly commit perjury, &c., on any trial for felony," &c., he shall be punished in the manner Hinch has been sentenced to be punished in this case.

In this case the indictment charges that Patrick was on his trial for larceny, &c., and it is insisted that all larcenies are felonies, and various authorities have been cited in support of the position. No definition of felony, however, as drawn either from the character of the crime or the punishment inflicted, is sufficiently comprehensive to cover this case. There are statute larcenies that are not made felonies by statute, and which were neither larcenies nor felonies at common law. In this case the indictment against Hinch should have charged or shown that the larceny for which Patrick was tried, was either made felony by statute, or was such as at common law amounted to felony.

On the second point, the words, "it then and there became and was material to inquire," refer plainly and directly to the county and Court at which Patrick was tried, and cannot by any fair construction be made to relate to the time of trial. The (160) authorities are express that it must be charged or shown to have been material "upon the trial." For this defect the judgment must be reversed in toto. The first point was examined from a belief that it might be important to declare the law thereon. The other points raised, have no bearing upon the judgment, and are not deemed material.

The Circuit Court erred, therefore, in refusing to arrest the judgment, which is now reversed with costs.

(*a.*) In an indictment for perjury, against a party to a suit, it is necessary to show by proper averments, that he was sworn under circumstances which authorized his being sworn as a witness in the cause. (*R. S.* 1835; title, "Justices' Courts, p. 361.) The State *v.* Hamilton, 7 Mo. R., p. 300.

Decisions of the Supreme Court of Missouri,

JACKSON DISTRICT, SEPTEMBER TERM, 1829.

Davis v. Clay, executor of Morrison.

1. An agreement that land should be chargable with, and a security for the payment of a debt, though not a legal is yet an equitable mortgage.
2. A purchaser with notice of the land subject to such incumbrance will not be protected in equity.

APPEAL IN CHANCERY, from Ste. Genevieve Circuit Court.

Wash, J., delivered the opinion of the Court.

In this cause a bill was filed by the complainant against the defendant and one Scott, to foreclose a mortgage, &c. The Circuit Court decreed the foreclosure, sale, &c., from which Davis appealed to this Court.

The facts are, that on the 23d of June, 1821, the above named defendant, Scott, executed a covenant, *real* mortgage, or instrument in writing, to the testator, Morrison, in the words following, to wit: "To all to whom these presents shall come: Whereas, I, John Scott, of the county of Ste. Genevieve and State of Missouri, am justly indebted to Col. James Morrison, of the county of Fayette, in the State of Kentucky, in the sum of three thousand eight hundred and thirty-eight dollars and sixty-six cents, lawful money of the United States, to bear interest from the date hereof; for which sum, said Scott has executed his note of equal date with these presents, till full and perfect payment. Now know ye, for the better securing unto the said Morrison, his heirs and assigns, the full and perfect payment of the said sum, on or before the first day of March next ensuing; that I, the said John Scott, for (162) myself, my heirs, executors and administrators, do covenant, promise and agree to and with the said James Morrison, his heirs, executors, administrators and assigns,

that the undivided interest of one third part of, in and to, a certain tract of land, known by the name of the Saline tract, in the county of Ste. Genevieve and State of Missouri, owned in common with Henry Dodge and the heirs of Edward Hempstead, containing about twelve thousand arpents more or less, being the same that was purchased by said Dodge, Hempstead and Scott, as the property of Mr. Peyroux; and also, as the property of Mr. Maxwell, as by deeds of record will fully appear, and every part and parcel thereof shall stand charged and chargeable with, and stand, continue, and be a security unto him the said Morrison, his heirs, executors, administrators and assigns, as well for the payment of the principal as the interest thereon, until the same shall be fully and finally paid and satisfied according to the true intent and meaning of these presents; reserving, however, to the said John Scott, his heirs and assigns, the rents and profits of the said land and saline, above and before *securited* and mortgaged," &c.; which was regularly acknowledged and recorded on the day of its date, and of which the defendant Davis had full notice; that after the execution of said instrument in writing, a judgment was obtained against said Scott, under which the premises were seized and sold to the defendant Davis, for the consideration of one dollar.

The questions presented for consideration are,

First. Whether the instrument be valid as a legal mortgage, &c.?

Second. If not a mortgage in law, whether it can be an equitable lien?

The instrument is imperfect and defective as a legal mortgage, but it may well be regarded as an equitable mortgage.

An agreement respecting real estate, for good consideration, *imposes* a lien as against persons having notice, &c. 4 *Brown ch. c.* 31–4, *Brow. ch.* 462, *P. Wms.* 282 and 429. If an equivalent be given, though the contract be not executed with all the formalities of law, yet in equity, the use is in the purchaser, &c., *Gibb.* uses 49 eq. 30.

The decree of the Circuit Court is, therefore, correct, and must be affirmed, with costs.

Decisions of the Supreme Court of Missouri,

ST. LOUIS DISTRICT, SEPTEMBER TERM, 1829.

STOKES *v.* MCALLISTER.

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1. Neither the 5th section of the act of 1827, nor the act of the 4th of July, 1825, concerning judgments and executions, repeals the 73d section of the act of January, 1815, giving to widows the right to remain in the mansion house of their husbands, and the plantation thereto belonging, until the assignment of dower.
2. The right of the widow to remain in the mansion house may be assigned.
3. Ejectment is the appropriate remedy to regain possession, should the widow be evicted; the remedy by action for damages given by the 73d section of the before mentioned act being cumulative.

ERROR from the St. Louis Circuit Court.

WASH, J., delivered the opinion of the Court.

The plaintiff in error brought an action of ejectment against the defendant, in the St. Louis Circuit Court. The cause was tried at the March term, 1819, on the issue of not guilty. The facts appear by a case agreed in substance as follows:—William Stokes and the plaintiff intermarried in England, where they lived and cohabited together for some time, and then separated, having executed articles of separation by which he, the said William, stipulated to pay an annuity of £100 yearly, to William Sparrow and another, as trustees for said plaintiff; that said William removed to the State of Missouri, and there lived separate from said plaintiff, until the time of his death, which happened in Sept., 1823, without lawful issue, and leaving the plaintiff his lawful widow. He, said Stokes, having previously made and published his last will and testament, and thereby devised all his estate, real and personal, to John O'Fallon, in trust for his (Stokes') illegitimate daughter, and appointed said O'Fallon (164) his executor, who qualified as such: that said Stokes, at the time of his death,

was seized in fee of the premises in the declaration mentioned, the same being the mansion house and plantation in which he resided at the time of his death. That he also died seized of other real estate in Missouri; that immediately after the death of said William, the plaintiff with the assent of said executor, entered upon and took possession of said mansion house and plantation, and leased the same to one Edward Wheeler, who entered upon, occupied and possessed the said mansion house and plantation until he was ousted by the defendant. That the plaintiff soon after the death of her said husband, commenced a suit for the assignment of dower, which at the time this cause was tried was still pending. That said William Stokes not having paid the annuity stipulated for in said articles of separation, suit was brought by Sparrow, the surviving trustee, against O'Fallon as executor, and judgment recovered for $2,462 and five cents, to be levied of the lands and tenements, goods and chattels which were of said Stokes; that one Nathan Davidson also recovered a judgment in the same Court against said executor for $7,370 debt, and $1,216 03 damages, to be levied as above stated. That executions issued in conformity with the judgments, and were levied on the mansion house and plantation aforesaid, and that the same were in due form of law advertised and sold on the 8th of September, 1825; that John O'Fallon became the purchaser and afterwards conveyed the same to the defendant, who on the 12th of February, 1826, entered upon the said premises and ejected said Wheeler therefrom. Upon these facts the Circuit Court gave judgment for the defendant, to reverse which, this writ of error is prosecuted. The only question presented for consideration, is, whether the sale and conveyance aforesaid to O'Fallon, divested the right of the widow to hold, occupy and enjoy in person, or by her tenant, the mansion house and plantation of her deceased husband.

By the 73d section of "An Act directing the probate of wills and the descent of intestate's real estates, and the distribution of their personal estates, and for other purposes therein mentioned," pased Jan. 21st, 1815, it is provided that "every widow after the death of her husband, may tarry in the mansion place of her husband and the plantation thereto belonging, rent free, until dower shall be assigned her." The act supplementary to the above recited act passed Jan. 20th, 1816, sections 8 and 9, authorizes the sale of real estate by the executor or administrator, reserving the widow's right of dower. "An Act supplementary to and in amendment of the fore-
(165) going acts," passed January 25, 1817, regulates the widow's dower after all just demands against her husband's estate are paid, and in case of insolvency, provides that she shall not be entitled to any dower in the lands, &c., but shall be entitled to tarry in the mansion house of her deceased husband and the plantation thereto belonging, of which he died seized and possessed, rent free, for the term of two years," &c., sec. 1 and 4. The 5th section provides that lands, &c., may be sold upon judgment and execution, &c., after the expiration of eighteen months, and makes no reservation of the right of dower, or any provision on the subject, and repeals all acts and parts of acts repugnant to it, &c. "An Act to direct descents and distributions," passed Jan. 11th, 1822, "reserves the widow's right of dower," &c. "An Act concerning executors and administrators," passed on the 12th Jan., 1822, authorizes the executor or administrator, where the personal estate is insufficient, to sell upon application to the Circuit Court, lands, &c., without prejudice in any manner to the widow's right of dower." And "An Act supplementary to an act concerning executors and administrators," passed Nov. 28th, 1822, authorizes executors and administrators to sell, &c., reserving the widow's right of dower. By these laws it

will be seen that the widow's right of dower is expressly protected as against the acts and rights of the heirs, executors and administrators. But it is contended that the 5th section of the act of 1817, above referred to, is repugnant to the provision in the act of 1815, allowing the widow to tarry in the mansion place, &c., until dower be assigned her. It is certainly not so in its terms, and looking to the spirit of all the laws on the subject, we think they may well stand together.

The widow of an insolvent person is clearly secured in the possession of her deceased husband's mansion, &c., for the term of two years, and a sale under the 5th section of the act of 1817, could not divest her right, and it can hardly be supposed that the Legislature intended to place the widows of solvent persons upon a worse footing than the widows of insolvents, which might be the case, if the position contended for by the defendant's counsel be correct. It seems to us pretty clear that the Legislature intended widows should hold possession for two years or until their dowers should be assigned, (as the case might be that the estate was or was not insolvent,) absolutely and without regard to the rights of creditors during that period, and that sales made in the mean time should pass the title of the property subject to (166) the widow's right of possession. The act regulating executions, passed July 4th, 1825, contains no broader provisions to subject lands to sale under execution, than those contained in the 5th section of the act of 1817, above cited and relied on.

The sale under execution to O'Fallon could not, therefore, divest the widow's right of possession. It has been argued, that the right to tarry, &c., is personal and not assignable, and the widow had no power to let the premises. We think differently. It has been argued, also, that the action of ejectment is not the proper remedy, but a special action for damages under the 73d section of the act of 1815 above referred to: we think the remedy therein provided merely cumulative, and that the action of ejectment is the appropriate one to regain the possession.

The judgment of the Circuit Court is, therefore, reversed, with costs, and the cause remanded for a new trial in conformity with this opinion.

M'GIRK, C. J., dissenting.

My opinion is, that in this case the widow not only has a right to possession till dower assigned, but that she has a right to dower against the purchaser under the execution and until it shall appear that, to pay debts, her dower must be sold, this right continues.

HECTOR (a slave) *v.* THE STATE.

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1. The confessions of a prisoner, extorted by pain, or made under the influence of hope or fear, are inadmissible evidence. (Note *a*.)
2. It is the province of the Court and not of the jury to determine whether a confession is made with that degree of freedom which is necessary to make it admissible evidence.
3. The discharge of a jury after they had heard the evidence and retired, in consequence of the sickness of one of the Jurors, is not error on a trial for burglary.

ON WRIT OF ERROR.

M'GIRK, C. J., delivered the opinion of the Court.

This was an indictment for burglary. In the course of the trial, certain instruc-
(167) tions were asked for by the prisoner's counsel and refused, and other instructions given in lieu thereof and objected to. A part of the testimony was, that about half past ten o'clock at night, when the burglary was discovered, certain persons caught Hector and began to flog him to make him confess what he knew concerning the burglary and stealing of the money mentioned in the indictment. That they continued flogging all night, that he screamed under the lash, and said if they would release him he would find the money. The State then examined one McKinney, who said, that about day break he was awakened by a loud hollowing or screaming in the rear of his house, that he arose, and on inquiry was informed by some persons there, near his house, that certain persons were flogging the slave Hector, to compel him to discover. That when Hector heard the witness' voice he called on him to come to his assistance; that then the witness went to Hector, and told him if he took the money he ought to confess, and then asked Hector if he took the money. That Hector replied that he took the money, and that he would show the witness where it was, but that he did not wish the persons who had been flogging him to accompany him. That the money was at Mr. Menard's, his master's house, and that if the witness would go there alone with him, he would find the money. That the other persons would not consent to that, unless they also would be allowed to go along, and then Hector, the witness, and the other persons, went to the house of Mr. Menard and did not find any money. That witness conceiving that Hector had deceived him, gave him several lashes with a cowskin, and then left him.

The prisoner's counsel then moved the Court to exclude McKinney's testimony from the jury, on the ground that the confession of Hector was not freely and voluntarily made, but extorted by pain, &c., which motion the Court overruled; and the prisoner's counsel also prayed the Court to exclude from the consideration of the jury, all the confessions which were extorted from him, which the Court refused.

But instructed the jury that they should exclude from their consideration any confession made by Hector under the influence of torture or pain, or hope or fear, but that the confessions of the defendant, which, in their opinion, was given freely and

voluntarily, should be taken as good evidence against the prisoner, which instruction was objected to, &c.

The first question to be considered is, did the Court err in refusing to exclude the testimony of McKinney from the jury? I think in this the Court did err.

(168) Hector had been under the lash the greatest part of the night. This circumstance might of itself be sufficient to subdue him into any confession required. No doubt when he saw McKinney he hoped for some relief, and asked him for it, but he was told that if he was guilty he should confess, and then was asked if he took the money, to which he replied he had taken it and offered to show where it was. This all might have been done, and most probably was, to gain a respite from pain; which view of the subject is strengthened by the fact that no money was found where the party and prisoner went to look for it.

The Court erred in instructing the jury that all the confessions, freely and voluntarily made, were evidence. And those not of this character not evidence. Whether a confession is sufficiently free and voluntary to be competent testimony, is a matter of law to be decided by the Court and not by the jury. In this case there was another confession other than that made to McKinney that he took the money, which I consider made under the influence of pain, which should by the Court have been excluded from the consideration of the jury.

Another point made by the prisoner's counsel is, whether after a jury have been sworn, heard the evidence, and retired to consider of their verdict, they can be discharged on account of the sickness of one of the jurors. In this case the juror was sworn, and on his oath declared he was unable, by reason of sickness, to serve any longer, and then the whole were discharged. We are of opinion that there is no error on this point.

Judgment reversed and sent back for a new trial.

(a.) See Hawkins v. The State, 7 Mo. R., 192.

(169) HAMTRAMCK *v.* THE BANK OF EDWARDSVILLE.

1. Where an act of a Legislature gives to individuals a corporate capacity upon the performance of certain acts, a person contracting with these individuals by their corporate name, is precluded from denying the performance of those acts which were necessary to give them a corporate existence.
2. The act of the State of Illinois, establishing a Bank at Edwardsville, does not give to its President and Directors the power of assigning notes made payable to themselves.

TOMPKINS, J., delivered the opinion of the Court.

This was an action of debt brought by the appellees, to the use of R. F. McKinny, against the appellant, on a promissory note. Judgment was given in Circuit Court for the plaintiffs, appellees here; and from this judgment this appeal is taken. The bill of exceptions shows that, at the trial, the plaintiff gave in evidence the charter of the Bank of Edwardsville and the note declared on.

The defendant then moved the Court to decide that the plaintiffs could not recover, and this motion was overruled.

The defendant then proved that, before the bringing of this suit, the note declared on was assigned by the Cashier and President of the Bank of Edwardsville, to D. Prickett, by endorsements on the note. The plaintiffs offered to prove that the said note had, by D. Prickett, been assigned to A. Prickett, and by endorsement in blank of A. Prickett, had come into the hands of the present holder before the commencement of this suit, and that all of the assignments were, at the bar and before the trial, stricken out by the plaintiff's attorney; to all which the defendant objected, but he was overruled. It is contended by the appellant that the Court erred:

First. In overruling the motion of the defendant, that on the case made by the plaintiffs they had no right to recover.

Second. That the assignment of the note by the President and Cashier to D. Prickett, transferred the whole interest of the Bank in the note, and divested it of all right to sue; and that if the note did, by repeated assignments, come back to the payees, they must sue by their derivative title.

In support of the first point, it is insisted that the act of the Legislature given in (170) evidence, did not of itself give a corporate being to the President, Directors & Co. of the Bank of Edwardsville, but that its existence depended upon matter subsequent, and until the happening of such subsequent matter, there can be no such corporation, and no proof of the existence of those facts was offered.

The first section indicating the purpose of establishing a Bank is prospective, and says, "a Bank shall be established," &c., and contains a proviso that as soon as $50,000 shall be subscribed, and $10,000 paid, the corporation may commence business.

The third section provides that all those who shall become subscribers, shall be and they are hereby created and made a corporation, &c., and gives them a name, &c.

It appears very unreasonable that the appellant, after executing his promissory note to the President, Directors & Co. of the Bank of Edwardsville, should require the plaintiffs to prove that they had the right to use the name and claim the existence which the defendant himself, in executing his promissory note, had admitted. But why, it is asked, produce the charter at all, if the execution of the note is an admission of the existence of the corporation? Whether this Court would, without the production of the charter, permit the corporation to sue on a note executed to itself, is not now necessary to be decided, as the charter has been produced. But we are prepared to say that it is but reasonable that the execution of the note by the defendant, should be considered as an admission of the performance of all the acts required by law to be done by the plaintiffs, previous to the time of the commencement of the corporate power of the Bank. It might have been necessary to produce the charter to show the right of the corporation to maintain a suit or to take notes payable to itself.

Second. To decide whether the Bank should have sued in its character of payee or of assignee of the note, we do not think it necessary to examine all the arguments used, inasmuch as by the charter no power is given the President, Directors & Co. to assign notes executed to themselves. The object of the Legislature in creating this Bank seems to have been, to supply the country with a circulating medium of paper, or in the language of the act itself, of "bills obligatory and of credit," issued by such Bank and for such purpose, they are by the ninth section (referred to by the appellants) made assignable and negotiable. The power of assigning notes executed to the President, Directors & Co., is not given by the law, and not being at all ne-
(171) cessary to them in the ordinary course of their business, it is not to be inferred that the law makers intended they should exercise such power.

The judgment of the Circuit Court is affirmed.

MILLY *v.* SMITH.

A negro is mortgaged in the State of Kentucky, and afterwards, but before forfeiture of the mortgage, is carried by the mortgagor into the State of Illinois with a view to residence, from which State she is taken by the mortgagee and brought to Missouri, where she institutes an action for freedom against the mortgagee—held, that under the laws of Kentucky, which is the common law of England in this respect, the mortgagor is the legal owner of the slave; that he could emancipate her; and that the slave, by her residence in the State of Illinois, acquired a *sub modo* right to freedom by the ordinance of 87, which liberated her from the dominion of the mortgagor, and gave her a right to freedom until the mortgagee, by the means rendered necessary by the terms of the mortgage, again subjected her to slavery.

WASH, J., dissenting.

ERROR from the Circuit Court of St. Louis county.

M'GIRK, C. J., delivered the opinion of the Court.

This was an action on the part of Milly for freedom, under the ordinance of Congress of 1787, for the government of the North Western Territory. There was a verdict and judgment against the plaintiff in the Court below. The facts of the case appear to be, as found by a special verdict, that one David Shipman, then residing in the State of Kentucky, on the 17th of October, 1826, made a deed to Smith, the defendant in error, by which Shipman, among other things, granted, bargained and sold the plaintiff, Milly, as a slave to Smith, to have and to hold her, together with her increase, to said Smith and his heirs forever, subject to this condition, to wit: that whereas the above named Shipman in indebted to the Commonwealth's Bank of Kentucky in about the sum of $800, for which the said Stephen Smith is bound as security, and the said Shipman is also indebted to the heirs of William Cooper in about the sum of $600, for which the said Smith is bound as security in a replevin bond, (also Shipman is indebted to other persons in several other large sums, for which Smith is also bound as security,) and also said Shipman is indebted to Smith himself in about $200.

(172) Now the lands, (several tracts of land also sold or mortgaged,) slaves and chattels aforesaid, with their future increase, are hereby declared to be given in mortgage to secure and indemnify and pay the said Smith as security, and in his own right, in the several sums of money hereinbefore enumerated and mentioned, and it is hereby expressly understood and agreed upon between the parties, that the said Shipman may and is hereby permitted to retain and keep the possession of said land, slaves and chattels, with their future increase, and to have the use thereof, subject, however, to the lien hereby created; and should said Shipman, or the said Smith, at any time hereafter be able to effect a sale of the lands, slaves, &c., or any part thereof at their fair value, and apply the proceeds thereof to the payment of the liabilities and claims herein enumerated, or to the discharge of a judgment in favor of the Farmers and Mechanics' Bank of Shelbyville against said Shipman, that in such

case, the said Shipman and Smith will consent to said sale, and make title to the property so sold, in which title said Smith will release the lien hereby created. Witness our hands, &c. It is farther found, that soon after the execution of the said instrument, called a mortgage, Shipman, who was then greatly embarrassed in his pecuniary circumstances, took the said Milly, with several other of his slaves, and secretly, with intent to withdraw himself and property from Smith and other creditors, ran away with them to the State of Indiana, and there, in Jefferson county, executed a deed of emancipation in due form of law to the said Milly, she being present, which deed emancipated Milly with one other in the mortgage mentioned.

It is further found that Shipman then carried Milly to Peoria county, in the State of Illinois, where he then settled and resided, with an intention of residing there permanently; hired a farm, and declared his intention of residing there permanently, and has ever since resided there from November, 1826, till May, 1827, at which latter time said Smith came there and took Milly secretly and against her consent, and the consent of Shipman, and brought her to St. Louis, claiming her as his slave, and holding her as his slave, when and where this suit for freedom commenced: and the Court further finds, that after the deed of emancipation was executed, Smith paid as security for Shipman to the Sheriff, who had executions against him therefor, the claims of Levin Cooper, and the claim of Polly Rice, mentioned in the instrument of mortgage, amounting to the sum of sixteen hundred and thirty-four dollars, and (173) that the executions issued after Shipman had carried Milly to Indiana as aforesaid. It is further found that Smith never had possession of Milly till the month of May, 1827, when he went to Illinois and seized her and brought her to St. Louis, aforesaid, and that he claims her as a slave under the deed of mortgage, and that Shipman had, before the mortgage and during several years, had and held Milly as a slave. It is further found, that the deed of mortgage was executed in Shelby county, in Kentucky, where Smith and Shipman both resided, and that Milly was by Shipman then held as a slave.

The jury, or Court sitting as a jury, also find several statutes of Kentucky, the result of which is, that, for purposes of descent, slaves are real property, and that for the purposes of contract and execution they are personalty. The Court also find, that the common law of England is and was at the time of making this mortgage, the law of Kentucky.

Upon this state of facts and law, the question submitted to us is, whether Milly is by law entitled to her freedom? When we only look to the facts in this case, we see on one side a man largely indebted, hiding his property, and in fact destroying it, to prevent his creditors from reaping any benefit therefrom, and in this case, Shipman has been base enough to emancipate the slave to injure and ruin his security. We feel disposed to view him in a light but little below that of a felon. But there are two sides to every question: here is also the case of a person claiming the benefit of the ordinance of Congress of 1787, for the government of the North-Western Territory, which declares, that in that country there shall be neither slavery nor involuntary servitude. It is also a matter not to be forgotten, that Mr. Smith, perhaps once, that is, when he took the mortgage, had it in his power to have made such a contract that Shipman could not have had the possession and management of the property. Having premised this much, I will proceed to investigate the most prominent points made in the case:—

First, it is insisted that if Shipman was the legal owner of the slave at the time he brought Milly to Illinois, to reside there permanently with her, she became free in virtue of the ordinance.

This doctrine is conceded by Smith's counsel, and it has been so decided in repeated instances by this Court.

The next and main point in the case is, was Shipman or Smith the legal owner of Milly on the execution and by virtue of the mortgage? When this same case was (174) before this Court on a former occasion, the Court decided that Shipman was the legal owner of the slave according to their view and construction of the mortgage. Nothing new now appears on the record except that it now appears that the common law of England was the law in force in Kentucky at the time this mortgage was made: by that law, then, we are to decide the case. In Kentucky, slaves, for the purpose of contracts and conveyance, are chattels.

It is insisted by Smith's counsel that here there is a complete sale of the slave, and that what comes afterwards in the condition, amounts only to covenants which either party may or may not regard as he chooses, subjecting himself, however, to an action of covenant broken, and that Smith chooses to take possession of the slave, did no more than he might lawfully do. On the other side it is agreed that this instrument, when taken altogether, amounts only to a lien created by the act of the parties. That Shipman is the legal owner of the slave until it shall happen that Smith has to pay the debts or a portion of the debts in the mortgage mentioned; and also, until Smith shall afterwards foreclose this mortgage or obtain judgments in due course of law against Shipman, for the money Shipman owed him, and for that which he paid for him, and shall in such case subject the property to his lien by foreclosure, or by a bill in chancery, and that until this is done, Milly is free *sub modo* and free forever as to Shipman. When the argument in this case was first opened, I felt strongly inclined to doubt the legality of the former opinion of this Court, delivered when this case was up before. But I feel myself at last constrained to affirm that opinion.

The question is emphatically asked by Smith's counsel, could Shipman in Kentucky have legally emancipated the slave after making the mortgage? If this question can be answered satisfactorily in the affirmative, then it is admitted that Milly is free *sub modo*. I am of opinion that Shipman could lawfully do so. The reasons I will freely give. I believe that the conditions are as much a part of the instrument as the granting part itself is, and that they create qualifications, limitations, and restrictions, some of which are inconsistent with the idea that Smith could take possession of the property when he might choose to do so; and are inconsistent with the idea of legal ownership. The fact that Shipman was to have indefinite possession and perpetual use, is inconsistent with the end and use of ownership. But at all events, Shipman could not be considered to have a less interest than a lessee for years, see *Pow.* (175) *on Mortgages*, 206,-7, where the Court make a distinction between a case where the covenant is that the mortgagee will not hinder in the enjoyment, and where the covenant is that the mortgagor shall enjoy. In the latter, held to be lessee for years, in the former, tenant at will. In this case the covenant is, that Shipman shall enjoy indefinitely. And again in the same book, 221,-2, Mr. Powell says, a mortgagor in possession gains a settlement, because the mortgagee, notwithstanding the form has but a chattel, the mortgage being only a pledge for security to him for his money, and the original ownership of the land still residing in the mortgagor, subject only

to the legal title of the mortgagee so far as such title is requisite to the end of security.

In the same book, 225, 226, it is said the estate of the mortgagee until forfeiture, still continues as it was at common law before the interference of Courts of Equity; he is entitled to an estate as tenant in mortgage, in fee or for term of years, subject to any agreement made between mortgagor and mortgagee relative to possession, and defeasible at law on the performaace of the condition This latter authority only shows that so far as respects possession and the like, the mortgagee is not at liberty to redress himself contrary to his covenant. Many authorities might be cited to show that for many and important purposes, the mortgagor is considered to be the legal owner. This the mortgagor can do no act to affect the mortgagee's lien, nor can the mortgagee do any act to defeat the mortgagor's equity of redemption. But all incumbrances subsequently created by the mortgagor are to yield to the mortgagee's right to foreclose and have his money. Now in all such cases, I take the law to be, that the cases are good when the mortgagor's possession is indefinite by covenant, at least till the time has arrived that the mortgagee can exercise his right. In this case when has the mortgagee a right to possession? The possession and use are gone from him by covenant indefinitely, and when he pays the debts and then enforces his lien by a sale of the slave, if he should be the purchaser, then he may possess and not before. In this case, I take the law to be that Milly is free as to Shipman forever. For by the act of residence in Illinois that result is produced, and that as to Smith she has the same indefinite right to liberty that Shipman had to the possession of her, and until the lien is enforced by some mode known to the law, she ought to enjoy her freedom. Now if Smith should delay this for twenty years after his right to do so has arisen, then the presumption would arise that he had no (176) demand, and her right to her freedom would be unconditional. Upon the whole matter, I am of opinion that Milly is free *sub modo*, and that the judgment of the Circuit Court ought to be, and is reversed with costs, and such judgment given as the Court below ought to have given, which is, that Milly is free.

WASH, J., dissenting.

I dissent from the opinion of the Court above delivered. I think the weight of authority is, that the mortgagee is the legal owner. Various authorities have been cited on both sides for and against the position. Most clearly the mortgagor is not the full owner, he is at most but the qualified owner. In this case Shipman was the qualified owner for specific purposes, and had no right to emancipate the plaintiff in Kentucky or elsewhere; indeed, it seems to be conceded on all hands, that Shipman could not have emancipated Milly by his express deed, and why give indirect and fraudulent efforts and implied assent more effect than his deed could have? I incline to consider the plaintiff in the light of a purchaser from Shipman, with a full knowledge of Smith's lien.

(177) CHOUTEAU v. HILL & KEESE.

1. An intestate's effects are sold under an execution by a Sheriff, who, after satisfying the debts, &c., has a surplus in his hands, for which the administrator gives a receipt, but never actually receives the money—held, that in whatever manner such surplus may have been applied, the administrator must account for it, and unless he does, his security will be liable in an action on his administration bond.
2. Nor will the circumstance of the party suing being an administrator, and having assets of the intestate in another State, discharge the security from his liability.

WASH, J. dissenting.

APPEAL from St. Louis Circuit Court.

TOMPKINS, J., delivered the opinion of the Court.

This appeal is prosecuted by Chouteau to reverse a decree of the St. Louis Circuit Court, sustaining a demurrer to a bill filed against the appellees, and dissolving an injunction thereon granted. The bill sets out that Thomas Brady died intestate; that administration of his estate was granted to John R. Jones, who executed a bond with the complainant as security, in the sum of $6,000, conditioned as required by the act of 1815; that before the death of Brady, the appellees commenced a suit against him, which, after the death of Brady, survived against Jones as administrator; that Jones appeared and pleaded, and pending the suit, died; that letters of administration *de bonis non* were then granted to Augustus Jones and Harriet Brady; that the administratrix, H. Brady, pending the suit, intermarried with John Scott, who was made a defendant; and that at the October term of the Circuit Court, 1824, Hill & Keese had judgment for $2,768 53; that the appellees, before issuing any execution on said judgment, brought an action on the administration bond of John R. Jones against the appellant, and had judgment; and that his damages were assessed to $3,032 38; that on the trial of said cause, a document bearing date the 23d October, 1823, purporting to be a receipt passed by said Jones to the Sheriff of the county of St. Louis, in the words and figures following, was given in evidence:

Received of John K. Walker, Sheriff of St. Louis county, $4,200, amount of the surplus made by sale of the lot of ground in the city of St. Louis, as the property of (178) Thomas Brady, deceased, on execution in favor of T. Bond and P. Menard, against John Rice Jones, administrator of said deceased. On said evidence and other the judgment against the appellant was given, and damages assessed as above mentioned. The bill further states, that Hill, one of the appellees, has obtained administration of the estate of Brady in Illinois, and that as such, is possessed of assets; and that the appellees did not communicate to the appellant and his counsel, t[illegible]t that no money had been received by Jones of the Sheriff as surplus proceeds sale under Bond & Menard's execution, but availing themselves of the igno[illegible] the appellant and his counsel, gave said receipt in evidence and urges this as [illegible] of relief.

It is not pretended that Jones, if alive, could avoid the effect of the receipt given by him to the Sheriff on account of any fraud or mistake; but the appellant's counsel takes the ground, that the liability of the surety is not commensurate with that of his principal, but is limited by the condition of his bond. His liability is limited in amount to $6,000 by the condition of his bond, and he is certainly liable for all the money Jones did receive, not exceeding $6,000, as well as for all that he ought to have received and neglected to receive: suppose, for instance, a by-stander had purchased the property; could not Mr. Jones, having a right to receive the surplus of the sale, say to the Sheriff, receive from him so much as will satisfy the execution, and I will give you a receipt for the rest—he has paid me, or will pay me, or I will take it on him and give you a receipt. The Sheriff is certainly not bound to see that administrators rightly apply the funds which come to their hands. In whatever light this subject is viewed, whether Jones paid a debt he owed to the Sheriff with the money which he acknowledges to have received, or whether the Sheriff at his request kept the money for the purpose of paying a debt of Jones' to any other person, or whether he (Jones) meant to give it to the Sheriff, he is certainly liable to Brady's estate for the amount; and are we to be told that the security is not liable for the misapplications of the funds of intestates by the administrator? It may be true that the appellee is in possession of assets of Brady's estate in Illinois; but it is impossible to conceive that this should be any reason why the appellant should not pay the (179) amount he owes in consequence of his liability for the maladministration of his principal.

The judgment is affirmed.

Wash, J., dissenting from the above opinion.

LABERGE v. CHAUVIN.

1. An assignee of a debt secured by a mortgage, may, by a bill in Chancery, compel the sale of the mortgaged premises for the payment of the debt, as the mortgage by the assignment of the debt, passes as an incident to it. (Note *a*.)
2. An answer responsive to a bill is evidence till disapproved.
3. Under the 42d section of the act of 1825, regulating proceedings in Chancery, the facts on which a decree of the Circuit Court is founded, must appear in the record, else on an appeal to this Court the decree will be reversed, and the cause remanded.

APPEAL from St. Louis Circuit Court.

WASH, J., delivered the opinion of the Court.

This is an appeal by Laberge from a decree in Chancery of the St. Louis Circuit Court. The complainant's bill is founded on a bill dated May 13, 1824, executed by one Joseph Gravline and wife, of the one part, and the defendant Laberge, of the other part. By this deed Gravline conveyed to Laberge a tract of land in St. Louis county, for the sum of $300, to be paid in the following instalments: one hundred dollars in two months from the date of the deed, and the remaining $200 in eight instalments of $25 each, payable every three months, beginning from the day of the payment of the first $100. The deed contains a clause mortgaging the land to secure the payment of the purchase money. On the 8th of June, 1824, Gravline made the following assignment of the debt due or to become due to him from Laberge. "Personally appeared before me, a Justice of the Peace of the county of St. Louis, Jos. Gravline, who acknowledged to have this day assigned to Lafreinoir Chauvin, a sum of three hundred dollars due to him from Jos. Laberge, being the consideration money for the purchase of a certain tract of land of said Jos. Gravline and wife, transferred to said Jos. Laberge by deed bearing date the 13th day of May, 1824. This assign-
(180) ment being for value received, and subject to conditions, as to the terms of payment, as stipulated in the said deed of sale. Dated this 8th day of June, 1824.

his
JOSEPH ⋈ GRAVLINE, [L. S.]
mark.

Signed and acknowledged before me, the day and year aforesaid:

J. V. GARNIER, J. P.

Of which assignment Laberge, the defendant, had notice immediately after it was executed.

The bill charges, that at the time of the assignment and notice, Laberge had not paid more than the first $100. The answer avers the payment of $160 75, and in this, is responsive to the interrogatories of the bill. The decree sets out, that the defendant had failed to prove, by competent evidence, the payment of more than $100, &c. Some short time after Laberge had notice of the assignment by Gravline to Chauvin, he, Laberge, procured Gravline to enter an acknowledgment of satisfac-

tion on the margin of the record of the mortgage, and soon thereafter sold the land. Laberge insists in his answer, that he had a right to pay Gravline; that he did pay him the whole amount of the consideration money before the said acknowledgment of satisfaction by Gravline. The Court decreed against Laberge for the consideration money and interest, after deducting the $100 admitted by the bill to have been paid by Laberge to Gravline, before the assignment.

I shall notice only two of the errors assigned.

First. The want of Jurisdiction.

Second. In decreeing against the defendant's answer as to the $60 75 over the amount admitted by the bill to have been paid, &c.

The law seems well settled, that debts due, or to become due, as well as all possibilities or contingent interest, whether of real or personal property, are assignable in equity, and after notice of the assignment, the debtor will be bound to pay the money &c., to the assignee, and not to the original creditor. 1 *Maddock's Chancery*, 548–9, and authorities there cited. The assignment of the debt is an equitable assignment of the mortgage, 2 *Bur.* 969; 9 *Ves.* 411; 1 *John. R.* 580. There is, therefore, no want of jurisdiction.

On the second point, the law is, that the answer, when responsive to the bill, is evidence, and must be taken as true until it be disproved. The Circuit Court erred, therefore, in not deducting the amount alledged to have been paid before notice of the (181) assignment, and for this the decree should be reversed.

Now, on examination of the record, it will be seen that the evidence upon which the decree is founded has not been preserved in any of the modes prescribed in the 42d section of the act to regulate proceedings in Chancery. *Geyer's Dig.*, p. 646, which was in force at the time of rendering this decree. For this error, decrees have been repeatedly reversed by this Court, and for this the cause must be remanded. A reversal on the second error noticed, would not make it necessary to remand.

The judgment and decree of the Circuit Court is reversed, with costs, and the cause remanded for a new trial.

(a.) See Crinion v. Nelson, 7 Mo. R., p. 466.

Decisions of the Supreme Court of Missouri,

FAYETTE DISTRICT, OCTOBER TERM, 1829.

The State v. English.

1. On a prosecution for an offence which must be commenced within a given time after its commission, if the first indictment is quashed, and the second one, in order to prevent the bar of the statute of limitations, sets out the proceedings under the first, they must be stated with the precision and certainty required in original criminal proceeding.
2. When an indictment is quashed, and the period elapsed within which a prosecution should be commenced, the second indictment should lay the offence on a day within the time limited by law for the prosecution of the offence; and the State, on the trial, should show the facts which bring it within the exception of the statute of limitations.

WRIT OF ERROR from Clay Circuit Court.

Tompkins, J., delivered the opinion of the Court.*

English was indicted for exchanging on the 1st of April, 1828, one gallon of spirituous liquors with an Indian, for a gun. The bill was found at the August term of the year 1829. The jury also find in these words, that "at a Circuit Court held for the county of Clay on the 25th of November, 1828, being within the space of one year from and after the commission of the offence aforesaid, by him the said Charles English, the grand jurors of the county of Clay found a bill of indictment against him, the said Charles, charging him with the same offence aforesaid, and that the said bill of indictment was prosecuted, and was pending in the said Court until the 5th day of August, 1829, at which time the proceedings had upon the said indictment for the (183) offence aforesaid, were reversed and set aside by the said Court, and the said

*Absent, M'Girk, C. J.

indictment was quashed and held for nought; and so the jurors do say, that the said offence so as aforesaid found, was committed by him, the said Charles, in manner and form aforesaid, within one year preceding the time of their present finding, contrary to the form, &c."

Offenders of this kind are by law to be prosecuted within one year after the commission of the offence, provided that where the indictment has been quashed or the proceedings set aside or reversed, the time during the pending of the said indictment shall not be reckoned within the statute. In our opinion, the time of the commission of the offence might properly have been laid within a year preceding the time of finding the bill; and evidence of the quashing of the first indictment might have been introduced by the State, to account for the last bill not being found within the time limited by law. But the State having chosen to set out in the present indictment as well the previous bill and proceedings thereon, as the commission of the offence for which the appellant was prosecuted, it became necessary to use, in stating the finding of the first bill and proceedings thereon, all the certainty required in charging the commission of the offence. It is not stated in the last indictment that the grand jury which found the first bill was sworn, nor is the prosecution of that bill of indictment alledged with the certainty of time and place. It is not thought necessary to mention more instances of the want of certainty, as they are obvious enough. If the above recited clause of the last indictment were to be stricken out as surplusage, then we hold the indictment would be bad; as the time at which the commission of the offence is charged, is more than one year before the finding of the bill, and bad on its face. For although the State is not bound to prove the offence committed on the very day laid in the indictment, yet we hold it necessary to lay a day within the time limited by law, for the prosecution of such offences.

The judgment of the Circuit Court is reversed.

JACKSON DISTRICT, APRIL TERM, 1830.

Evans v. Hays.

If plaintiff fails to file security for costs agreeably to order of Court, his suit shall be dismissed, and he shall be adjudged to pay the costs.

APPEAL from Cape Girardeau Circuit Court.

Tompkins, J., delivered the opinion of the Court.

This is an action of assumpsit, brought in the Circuit Court of Cape Girardeau county by the appellant, against the defendant for money collected as Sheriff, and which he failed to pay over to the appellant.

The first error is general. The second is, that the Circuit Court allowed the defendant to set off against the plaintiff's demand the amount of an execution for $59 38 3-4, issued in favor of the plaintiff against the defendant, on a judgment of the Supreme Court reversing a judgment of the Circuit Court, against the present plaintiff in favor of the present defendant. From the bill of exceptions we learn that an execution issued from the Circuit Court of Cape Girardeau county in favor of the present defendant against the plaintiff for $57 07 1-4, returnable to the August term, 1826, on which the money was made. That in the meantime, the defendant's judgment against the plaintiff was reversed in the Supreme Court, and that by order of the Court the plaintiff had the money restored to him, the cause being remanded for further proceedings. That after it was sent back to the Circuit Court, it was dismissed because the plaintiff there (now plaintiff in the present cause) had not filed security for costs, agreeable to an order of the Circuit Court. (185) After the cause was remanded to the Circuit Court, as before stated, and the costs paid by Evans to Hays had been restored to him by order of the Supreme Court, the parties stood in that Court as if there had been no interruption of the pro-

ceedings in the Circuit Court, and as if neither party had paid any costs. The costs then awaited the event of the suit. Evans failed to file security for costs, and the costs were rightly adjudged to be paid by him. The sum of $57 07 1-4 constituted a part of those costs, and the difference between $59 38 3-4 and $57 07 1-4, is, as we suppose, the amount of costs accumulated after the cause was remanded. In this we find no error.

The third error assigned is, that the Court erred in directing its Clerk, upon an ex parte motion of the defendant, to retax the costs in a case which had been in the Supreme Court, and issue an execution against the plaintiff, because the Supreme Court had ordered the plaintiff restitution. Of the matter assigned for error here, enough has been said before. We think there is no error.

The matter fourthly assigned for error is, that the Circuit Court permitted the receipt of the plaintiff, given to James Montgomery for his fee as deputy Attorney General, to go in evidence as an offset against the demand which the plaintiff had the defendant charged with upon an execution issued in favor of the United States against said James and others.

By the bill of exceptions it is seen that Evans, in his bill of particulars, had a charge for a tax fee on an execution against Montgomery and others, but the execution produced was against Montgomery alone. There seems then no difficulty in saying that the Circuit Court did right in admitting the receipt.

The matter fifthly assigned for error is, that the Circuit Court erred in permitting a receipt given by Evans to Thos. Fletcher for $5, to go in evidence as part set-off of a tax fee with which the plaintiff, Evans, had the defendant charged, collected upon an execution issued in favor of A. Wilson and Thomas Fletcher *v.* Mary Mathews et al. This receipt is for five dollars, on account in part of the judgment obtained, &c., which is to be applied as a credit on said judgment. On this execution $24 45 only were collected. The costs amounted to $25 47. We think that in such case the costs were to be first paid. Evans appropriated five dollars of this money to the plaintiff's use, and made himself by his receipt liable to the plaintiff for so much money received to the plaintiff's use. It was to be applied as a credit (186) on said judgment. We think there is no error in allowing the receipt to go in evidence.

The sixth assignment is, that the Court erred in permitting the evidence of William Garner to charge the plaintiff $6, with which he had the defendant charged as a tax fee on an execution issued in favor of John Risher *v.* Chas. S. Hempstead. Under this execution Garner, as deputy to Hays, sold a tract of land; Risher, the plaintiff, became purchaser, and wanted a deed for the land without paying the money, which was at first refused; but afterwards the deed was made at the instance of Evans, plaintiff in this case. No money here came to the Sheriff's hands by means of Evans, or rather at his instance. However the Sheriff may have made himself liable to the other officers of the Court, he certainly ought not to answer to Evans for his part of the costs. There is then, we think, no error here.

The seventh assignment of error is, that the Circuit Court erred in rejecting certain executions offered by the plaintiff to charge the defendant with the tax fees endorsed thereon as coming to the plaintiff. It is clear that when money has been received by the Sheriff, he is answerable to the extent of what is received. And the Court is inclined to the opinion, that when there is not enough collected to pay all the costs, the Sheriff may retain his own costs first, and pay to the other officers as

they may first demand, unless the Court shall, at the return term, make an apportionment of the money received among the officers of the Court.

The Court is inclined to think that these executions mentioned in the seventh assignment of errors, ought to have been left to the jury to say whether money had not come to the Sheriff's hands, and that the Court erred in rejecting them.

Therefore the judgment of the Circuit Court is reversed, and the cause remanded for further proceedings in conformity with this opinion, and the appellant is allowed his costs in this Court.

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(187) DAVIS v. SCRIPPS.

If the Court err as a jury, the mode of redress is to ask for a new trial; if as a Court, it should be clearly shown that the point of law was decided.

APPEAL from the Cape Girardeau Circuit Court.

M'GIRK, C. J., delivered the opinion of the Court.

Davis brought his action of ejectment against Scripps for a lot of ground in the town of Jackson. The cause went to trial on the general issue. Verdict and judgment for the defendant. A bill of exceptions preserved the testimony given in the case. The cause was submitted to the Court without the intervention of a jury. The verdict is entered in the common form, and judgment in form rendered thereon. The bill of exceptions says that the cause and evidence were submitted to the Court, and the Court gave judgment for the defendant; to which opinion of the Court the defendant excepts, &c.

Several errors have been assigned and insisted on to reverse this judgment. It will be unnecessary to go into an examination of the errors, because it does not appear that any distinct point was made in the Court below. Here the facts and the law were both submitted to the Court. Whether the objection goes to the error of the Court in finding a wrong verdict upon testimony too weak to warrant the verdict, or to the error of the Court in a misconception of law, does not appear. If the Court erred as a jury, the mode of redress is to ask for a new trial, and if that is improperly refused, the wrong may be redressed by this Court. But if the error is an error in point of law, then the party should expressly bring his point before the Court in a shape clearly showing that the point of law was decided on by the Court.

As far as we have been able to look into the case, there is no error. The judgment is affirmed.

(188) ASHABRAMNER v. PERKINS.

If on an appeal to the Circuit Court from a Justice of the Peace, the plaintiff recover nothing, he shall pay the costs of both Courts.

ON ERROR from Wayne Circuit Court.

WASH, J., delivered the opinion of the Court.

This was an action of account, commenced by the plaintiff in error against the defendant, before a Justice of the Peace, in which the defendant had judgment for one dollar and fifty cents. The plaintiff appealed to the Circuit Court, where, on trial, *de novo*, a general judgment was rendered for the defendant, and that he recover his costs, &c.

It appears from the bill of exceptions, that the papers in the cause had not been marked filed, by the Clerk, nor the cause regularly docketed, until it was called for trial, and for that reason the plaintiff moved for a continuance, which was refused. The plaintiff then moved the Court for a rule to order the Justice to certify the entries on his docket, which motion was also overruled. Upon the trial, *de novo*, there was general finding by the Court, (sitting as a jury,) for the defendant: Whereupon, the plaintiff moved to have judgment for costs against the defendant, on the ground that the defendant recovered less in the Circuit Court than was recovered before the Justice; the Court overruled the motion and gave judgment for costs against the plaintiff.

It is assigned for error: First. That the Court refused to continue the cause.

Second. That the Court refused the rule, prayed for against the Justice, and

Third. That the Court gave judgment against the plaintiff for costs.

It was the Clerk's duty to have filed the paper and docketed the cause; but it is not shown that his failure to do so, in any manner embarrassed or injured the plaintiff in the prosecution of his trial. The power of granting continuances by the Circuit Court is discretionary, and to be exercised soundly. We are not to presume that it was not so exercised in the case under consideration, and nothing appears in the record to warrant that conclusion. It was a mere clerical omission, not to file (189) the papers and docket the cause, which may or may not have affected the rights of the plaintiff. We are not to presume that it did.

Second. The object of the rule upon the Justice is not stated. From the certificate of the Justice, it would seem that a complete transcript had been returned by him. It should have been shown in what particular the record was defective.

On the third point the law is clearly with the defendant. By the 14th section of "an act concerning costs." *Revised Code*, p. 228, it is provided, that "on an appeal prosecuted by the plaintiff, if he recover nothing, or be non-suited in the Circuit Court, the defendant shall recover his costs in both suits," &c. This would be law without the statute. The 15th section of the act referred to, does not apply.

Upon the whole matter, we can see no error in the judgment of the Circuit Court, which is, therefore, affirmed with costs.

MONTGOMERY *v.* BLAIR.

If a verdict be found without evidence, or upon insufficient evidence, the proper course is to move for a new trial, and except to the opinion of the Court in granting or refusing the motion. If in the progress of the cause incompetent evidence is offered, the party should except.

ON WRIT OF ERROR from Perry Circuit Court.

WASH, J., delivered the opinion of the Court.

This was an action brought by Montgomery against Farrar in the Circuit Court, in which Montgomery had judgment. To reverse which, Farrar now prosecutes his writ of error. The evidence is all preserved by what is termed a bill of exceptions, beginning, "be it remembered that upon the trial of this cause, the plaintiff gave in evidence," &c., (setting out the evidence,) and concluding in these words, "all of which testimony the defendant moved the Court to exclude from the jury, as not being sufficient to support the plaintiff's action, which motion the Court overruled, to which opinion of the Court the defendant excepted."

Without entering into a minute examination, some of the evidence given in the cause was clearly competent, and whether sufficient or not, was for the jury and not (190) for the Court to weigh and determine. This point has been repeatedly adjudged by this Court. If the jury, or the Court sitting as a jury, find a verdict without evidence, or upon insufficient evidence, the proper course is to move for a new trial, and except to the opinion of the Court in granting or refusing the motion. If in the progress of the cause, incompetent evidence is offered, the party against whom it is offered should except, for it might well be, that the party offering incompetent testimony could sustain his cause by other and competent proof.

The judgment of the Circuit Court is, therefore, affirmed with costs.

Decisions of the Supreme Court of Missouri,

JACKSON DISTRICT, SEPTEMBER TERM, 1830.

Brown v. The Bank of Missouri.

1. To make a letter to an agent evidence in a case, the agency must first be established.
2. A written instrument cannot be contradicted, but may be explained by parol testimony. (Note *a*.)

ERROR from the Perry Circuit Court.

M'Girk, C. J., delivered the opinion of the Court.

This was an action of assumpsit on a promissory note, made by one Wilkison to Brown, payable at the Branch Bank in Ste. Genevieve, and endorsed by Brown to the plaintiff. The action was brought against Brown, the endorser, about three years after the note became due and payable. Brown wrote the following letter, addressed to one G. F. Strother: "Dear sir, any indulgence you think proper to give Capt. Wilkison on his note, due the Branch Bank of Missouri, and on which I am endorser, will fully meet with my approbation and consent. Yours, &c."

The plaintiff on the trial of the issue of non-assumpsit, gave in evidence the note, proved the endorsement, and gave in evidence the presentation for payment, and the protest for want of payment. But no evidence was given of notice to Brown of the non-payment. Evidence was also given that Brown was endorser for the accommodation of Wilkison. The plaintiff then offered the above letter in evidence, to establish a fact which would dispense with notice of the non-payment. The de-
(192) fendant objected to the admissibility of the letter to establish any legal fact which would dispense with notice. The Court overruled the objection and permitted the evidence to be read. Wilkison was called by the plaintiff to prove some facts in the cause, and did so.

The defendant then offered to prove by Wilkison, that Brown did not intend by his letter to guarantee the payment of the note, but only to show his acquiescence in the course the Bank had pursued with regard to the note as the bill of exceptions stated. The Court rejected this testimony. The plaintiff had judgment. Several errors have been assigned, of which only two will be noticed by the Court; the law on the others being with the defendants in error.

The first point is, did the Court err in receiving the letter in evidence? The objection is, that the testimony is incompetent to establish any material fact in the cause. The defendant in error insists, that this paper, by its legal effect, establishes the fact, that Brown considered himself liable, and that he treated with the Bank as a liable person, and having considered himself so, the legal inference arises, that he had legal notice of the non-payment of the note. It is answered to this, that there is no evidence except the letter itself, to prove Strother was the agent of the Bank, and until his agency is established, no connection can be supposed to exist between Brown and the Bank, so as to create the legal presumption that Brown treated with the Bank as a person having on him any legal liability. But it is insisted, that the letter by treating with Strother about the note, recognizes him as the Bank's agent. It is true the letter recognizes in Strother a power to control the note as it respects Wilkison; but whether this power existed in Strother by reason that he was the owner of the note, or the agent of the Bank, we cannot infer from any evidence then before the Court. Now in this case the Court did infer that Strother was the agent of the Bank, and must have made this inference from the fact that the note was endorsed to the Bank by Brown, and from the fact that the letter recognized Strother as having a power over the matter. These circumstances would rather prove that Brown considered Strother the owner of the note, and if it were so, then the letter was inadmissible, because irrelevant, and because it would belong to another party, and another cause. Strother's agency ought to have been established before the letter could be evidence in the case. We think the testimony too slight on this point, and that the paper ought to have been rejected. But suppose the agency had been established; yet (193) another question arises, which is, does Brown by this letter acknowledge any existing liability on him to pay the note as endorser, which would raise the legal presumption that he had notice in due time of the non-payment of the note? What does the letter say? It says not one word about present liability, nor any thing from which a jury could legally infer that any such liability did exist, and if that could not be legally inferred, then the paper was no testimony in the case.

The construction which we feel ourselves compelled to give this letter, is this: that Brown neither acknowledged nor denied any present liability, nor took upon himself any new liability, except such as might arise out of future acts of indulgence by the Bank to Wilkison. For he says, "future acts of indulgence will meet my consent;" and not that previous acts of indulgence do meet my consent. Suppose Brown had said that he believed in law he was liable, and had said no more. Would that be any legal testimony that he had notice of the non-payment in due time, and in the absence of all other testimony? We think not. In our opinion, the whole meaning of the letter is, that full scope is given to Strother to indulge Wilkison in future, and that Brown will not avail himself of any advantages that might arise to him, if it were done without his consent; according to this view, the letter raised no legal evidence that notice of non-payment had been given to Brown in due time.

The remaining point to be considered is, did the Court err in refusing testimony which went to show that Brown did not intend by the writing to guarantee the payment of the money. It is contended by the defendant's counsel, that to let in this testimony would be to contradict the written instrument, or to enlarge the obvious meaning of the letter. It is most clear that no testimony can be admitted to contradict a written instrument. But here testimony might be admitted to explain the circumstances which took place at the time the letter was made. It might be, that the letter related to another transaction; and if so, then it would be competent to prove it, and if proved, then the letter would be no guarantee of this debt. But it is unnecessary to labor this point, because the decision of the previous point establishes enough for the plaintiff in error.

The judgment is reversed, with costs, and remanded for a new trial.

Tompkins, J., dissenting. I do not concur in this opinion.

(a.) See Benson v. Peeble, 5 Mo. R. p. 139.

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(194) Governor of Missouri, to use of creditors of Chamberlain, v. Byrd, impleaded, &c.

In an action on an administrator's bond, evidence that administratrix was seen in possession of money left with her by her husband previous to his death, and money brought to her by a person sent to ascertain the circumstances of his death, supposed to be his, is properly admitted to a jury.

APPEAL from Cape Girardeau Circuit Court.

Tompkins, J., delivered the opinion of the Court.

This was an action of debt commenced on an administration bond, in the Circuit Court, against the defendant, one of the securities of Eliza Chamberlain. Plea, *nil debit*. Verdict for the plaintiff, and judgment rendered thereon. To reverse this judgment, this appeal is taken; and it is assigned for error, that the depositions of Timothy, Abigail and Emeline Flint were admitted as evidence.

The testimony of these witnesses was, that Eliza Chamberlain was seen in the possession of money to the amount of about two thousand dollars, part of which, she said, was left in the dwelling house with her by Jason Chamberlain, a short time before his death, and the rest was brought to her by a person sent to ascertain the

circumstances of his death, and it was thought that the money was found about the person of the deceased.

One breach of the obligation assigned in the declaration is, that the said Eliza hath not rendered a true and perfect inventory of all and singular, the goods and chattels, rights and credits of the said deceased; nor hath the said Eliza exhibited a just and true account and inventory of all and singular the goods and chattels, rights and credits of said deceased which have come to her hands, into the office of the Circuit Court for the county of Cape Girardeau, &c.

The evidence, it seems to this Court, was properly admitted in this breach.

The judgment of the Circuit Court is affirmed.

Decisions of the Supreme Court of Missouri.

FAYETTE DISTRICT, MAY TERM, 1830.

COLLINS v. BOWMER.

1. Writ of error lies on the judgment of the Court overruling a motion to set aside a non-suit. (Note *a*.)
2. To read in evidence an instrument of writing, without proof of execution, it must be made the foundation of the action. (Note *b*.)
3. An instrument sued on, purporting to be executed by the opposite party, can be offered in evidence, without any proof of execution.
4. Where a bill of exceptions is doubtful, the Court will not intend any thing for the benefit of the party whose duty it was to make the matter plain. (Note *c*.)

ERROR from the Circuit Court of Howard county.

M'GIRK, C. J., delivered the opinion of the Court.

This was a case originating before a Justice of the Peace, where Collins had judgment. Bowmer appealed to the Circuit Court, and the parties went to trial, and the plaintiff, Collins, suffered a non-suit. A motion was made to set aside the non-suit and overruled by the Court. To reverse this decree of the Court the cause is brought here by a writ of error. A bill of exceptions was taken to the opinion of the Court in overruling the motion. It has been made a question on the part of the defendant in error, that a writ of error will not lie on a motion to set aside a non-suit, and it has been shown that in some of the States, the practice is so, and in others it is not so.

It is sufficient to say on this matter, that the case of Mullanphy and English, *Missouri Reports*, p. 780, shows that a writ of error has been entertained in such a case, nor do we now see any reason to disturb that which we consider settled.

(196) The summons which issued from the Justice is to answer in an action of assumpsit on an account liquidated and certain. On the trial in the Circuit Court, the plaintiff produced an account between the parties, and on the back of the paper an acknowledgment was written to this effect: "This day settled with William Collins, all the within accounts, and fall in his debt sixty-seven dollars, &c." Signed, Charles Bowmer. The plaintiff offered to give the paper in evidence, without any proof of the hand-writing of Bowmer to the acknowledgment, which was objected to, and the Court sustained the objection.

The plaintiff then called on the defendant under a certain statute to give evidence in chief. The defendant was sworn and gave evidence tending to deny the execution of the writing. The plaintiff then offered to give evidence of the defendant's declarations made before the Justice on the trial there, which evidence was rejected by the Court. It does not appear what these declarations were, nor whether they related to the execution of the instrument. Then the plaintiff took a non-suit.

The first error made and relied on is, that the Court erred in refusing to let the account and acknowledgement go to the jury as an instrument declared on, it being the foundation of the action, and not denied by the oath of the defendant, according to the statute.

The second is, that the Court erred in refusing to receive the evidence as to the declarations of the defendant made before the Justice. It is insisted by Messrs. Clark and Reynolds, counsel for the plaintiff, that this paper is the foundation of the action, and that they are not bound to prove it, unless it be denied by the oath of the party. The act of the General Assembly says, (*R. C.* p. 479,) when any suit shall be founded on any instrument in writing, purporting to be executed by the other party the same shall be received in evidence, unless the party charged to have executed it, shall deny the execution thereof on oath. To entitle the plaintiff to read an instrument in writing under this statute, two things at least are required. The first is, there be an instrument purporting to be executed by the defendant. And secondly, that that instrument should be the foundation of the action in which it is offered in evidence.

The summons in this case says, the action is founded on an account liquidated and made certain.

This description does not imply any execution of an instrument in writing by the (197) party charged. Where an account is liquidated and certain, the parties must have accounted together, but accounting together may be affected without writing at all about the matter, and for any thing appearing by the summons, it may have been the case here. But it is said that the acknowledgment and the account are to be considered as one. This is not the case. The acknowledgment refers to the account and testifies to two facts; one is, that the account within is settled, and the other is, that a certain sum is due by Bowmer to Collins. Had this acknowledgement been referred to at all by the summons in such a way that the Court could see that it was the thing sued on, the plaintiff would have been entitled to read it without any proof. But as the matter is, he could not do so. There is no error in this point.

Upon the second point it will be sufficient to say, that we cannot say, only by conjecture, what the declarations were which the plaintiff offered to give evidence of. These declarations might or might not have related to the matter in issue. It is believed to be a rule of law, that where a bill of exceptions is doubtful, the Court will not intend any thing for the party, whose duty it was to make the matter plain.

Unless, therefore, we could see what the testimony rejected would have tended to prove, we cannot say whether the party was injured or not.

An objection was made that on the trial, wherein the non-suit was had, the exceptions should have been taken. This objection is not good, and so thought the Supreme Court of Kentucky, 4 *Bibb. R.* 278.

The judgment of the Circuit Court is affirmed, with costs.

(*a.*) See Johnson *v.* Strader & Thompson, 3 Mo. R., 360.
Howell *v.* Pitman, 5 " " 347.
(*b.*) See Maupin *v.* Triplett, 5 " " 423.
(*c.*) See Stewart *v.* Small, 5 " " 528.
Vaughn *v.* Montgomery, 5 " " 532.

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(198) BENTON *v.* CRAIG.

1. An attorney is not liable unless his client informs him of the nature of his defence.
2. Money is unreasonably and vexatiously delayed from the time the plaintiff's right of action accrues.
3. Right of action accrues against an agent for money received after demand by the owner, and neglect or refusal on his part to pay.
4. If money be paid to a lawyer for services to be performed at a future day, the right of action to recover it back accrues from the time he neglects or refuses to perform the services.
5. A notice to take depositions on 24th June, 1826, between the hours 8, A. M., and 6, P. M., and on the 25th, 26th, 27th and 28th, same month and same hours, is bad. If the beginning had been confined to a day certain, and the intention of continuing from day to day expressed, the notice would have been good.
6. A witness cannot testify to the amount of a record or of any written instrument, unless its absence be accounted for.

ERROR to Howard Circuit Court.

TOMPKINS, J., delivered the opinion of the Court.

This was an action of assumpsit for money had and received by Benton, the defendant in the Circuit Court, for the use of Craig, the plaintiff, and for money laid out and expended by the plaintiff for the defendant, at his request. Plea, non-assumpsit, and judgment for the plaintiff. To reverse which judgment the defendant, now plaintiff in error, sues out this writ.

Benton *v.* Craig.

On the trial of this cause in the Circuit Court, it was proved that some time in the year 1818, or at an earlier date, Craig employed Benton to attend to two law suits, for which business Craig paid him, through an agent, one hundred dollars. This agent, who was the witness, says that Craig gave Benton his promissory note for that sum of money, and Benton agreed to attend as counsel and attorney for the plaintiff, Craig, to those suits. It was also proved that Benton was employed by Craig in two other suits, and the payment of one hundred dollars was proved. It was further proved that Benton did nothing more, perhaps, in those cases than to argue a motion to dispauper one of the plaintiffs, who had been allowed to sue as a pauper. Some depositions were read, to the reading of which objections were made by the defendant below.

(199) The counsel for the defendant in the Circuit Court prayed the Court to instruct the jury:

First. That the plaintiff could not recover in this form of action.

Second. That Benton, as counsel for Craig, was not liable, unless Craig informed him of the nature of his defence, proof, &c.

Third. That they should not allow interest except from the commencement of this action. All of which instructions were refused.

As the cause may otherwise be disposed of, the Court is not disposed to decide whether the first instruction ought to have been given. The second instruction ought to have been given. The jury ought to have been informed whether Benton was furnished with the instructions necessary to enable him to defend the causes. But what kind of evidence, or how much of it might be requisite to satisfy the jury, is not for this Court to say. The third instruction was correctly refused, but the jury ought to have been instructed to allow Craig interest from the time his right of action accrued; for we hold that the payment of money is unreasonably and vexatiously delayed, from the time the plaintiff's right of action accrues. If money is received by a man as agent, a right of action accrues to the owner only from the time of a demand on his part, and a neglect or a refusal on the part of the agent to pay. If it be paid to a lawyer for services to be rendered at a future day, we incline to the opinion that the right of action to recover it back, accrues from the time that he neglects or refuses to perform the stipulated services.

The objections to the reading of the depositions were, that the notice was insufficient, that it was not properly served, and that the witnesses testified to the contents of records and of a draft, none of which were produced. The first of the objections as they appear in the bill of exceptions to have been made, is, that the deposition of one witness was taken without any notice served on the defendant. It was proved that the defendant was a Senator from this State in the Congress of the U. S.; and that while he was absent on his public duties, notice was served on his counsel and attorney at law, and a copy of the notice was put up in the Clerk's office, as is required by the statute in case of non-residents. The defendant's place of residence was proved to be in St. Louis. The service of the notice was bad. The notice need not be personally served, and inconveniences might have been experienced in finding (200) a proper person on whom to serve it. But this is no more than what may happen in the case of many other of our best citizens, who are temporarily absent, and may not, perhaps, have an agent on whom notice may be lawfully served; and it may here be observed, that our law gives another remedy in such cases, especially if it be attempted to evade the process of the Courts.

The second objection, in the order they appear on the bill of exceptions, is, that the notice was insufficient. The statute requires that the party shall have notice of the time and place of taking depositions. The notice given is to take depositions on the 24th day of June, 1828, between the hours of eight of the clock, A. M., and six in the evening, on Wednesday the 25th, on Thursday the 26th, on Friday 27th, and on Saturday the 28th of the same month and the same hours, &c. It seems to the Court that such a notice is as bad as no notice. It might as lawfully have extended to an hundred days. Had the time of beginning been confined to Wednesday 25th, and an intention expressed of continning from day to day till the business was completed, we do not hesitate to say it would have been good. But we are of opinion that the notice before the Court is bad.

The third objection is, in law, good. A witness cannot testify to the contents either of a record or of any written instrument, unless its absence be accounted for. One of the witnesses testified that the defendant presented to him a draft by Craig, the paintiff, for $100, which he paid, and recites the contents of the draft, which was in these words, or to use the witness' own words, in substance as follows:

"P. Holderman & Co.—Four months after date pay to Thomas H. Benton one hundred dollars, out of the proceeds of my salt, for which he is to attend to two suits against myself and others, brought by Hinkson, (or some such name,) and charge to account of your ob't serv't, GEO. CRAIG."

This part of the deposition should have been excluded, as the draft was not produced, nor its absence accounted for. For it goes to establish an agreement between Craig and Benton, and the draft itself, we are told by the witness, was probably delivered to Craig after it was paid; and had the draft been produced, it would have been the best evidence, to supply which the law will not call in the frail memory of man till the absence of the written testimony is satisfactorily accounted for. The payment of the money, however, it may be observed, might have been proved without proving the contents of this draft.

(201) The other witness testifies that in two of the causes where the plaintiff in error had been employed, pleas had been filed by the late Judge Gray and himself, as his memory serves him. The records of these causes are in the Circuit Court of Callaway county, says the witness, and will more certainly show by whom the pleas were filed. In this State the pleas are generally signed by the person filing them, and although the signature might have been the strongest evidence that they were filed by the signer, yet that is not the only admissible testimony of the fact. Had the witness testified to the contents of the pleas filed, this would have been inadmissible testimony. We think this testimony was properly admitted.

The judgment of the Circuit Court is reversed, and the cause is remanded for further proceedings in that Court. This Court not being agreed whether the plaintiff in the Circuit Court could have recovered on the count for money had and received, have chosen to say nothing on the first instruction prayed, and have accordingly decided the cause on other points, leaving the defendant in error to his choice, either of amending in the Court below or of depending on his old declaration.

HENRY v. LANE.

1. In a trial before a Justice of the Peace, evidence may be given to support a plea in abatement after the cause has proceeded in chief.
2. In a suit before a Justice of the Peace, the party is not required to swear to his abatable defence.

ERROR from the Howard Circuit Court.

M'GIRK, C. J., delivered the opinion of the Court.

Henry originally commenced an action before a Justice of the Peace. Henry had judgment, and Lane took an appeal to the Circuit Court. The plaintiff, Henry, on the trial proved his case, and then the defendant offered to introduce testimony to show that at and before the commencement of this action, the plaintiff was dead. The evidence was objected to. The objection was overruled. The evidence was haerd by the Court, and the defendant had judgment.

(202) Several errors have been assigned on matters growing out of a bill of exceptions taken on a former trial, but those errors have been abandoned. The only error relied on is, that the Court did wrong in receiving evidence that the plaintiff was dead before the bringing this action. To sustain this error, Mr. Wilson, counsel for the plaintiff in error, makes two points in argument, substantially as follows: First. That the evidence given was evidence in abatement, and should have been given before the cause proceeded in chief, and having failed to do so, has waived all matter in abatement.

Second. That though in this sort of a case the pleading may be *ore tenus*, yet that the party should have alledged his defence in that way and supported it by affidavit.

There can be no doubt that with respect to the matter of this defence, it should have been regularly pleaded, if the suit had been brought in the Circuit Court originally, but the law requires no pleading in cases before a Justice of the Peace. Every thing is open as to the mode of defence. When the cause comes into the Circuit Court, the law says it shall be tried *de novo* on the merits. In executing the law, the practice always has been to require no sort of pleading, but to give every thing in evidence; and in proceeding with the trial no regard has ever been had to the time when evidence in abatement should be given. To require this evidence to be given in the order in which it should have been pleaded in cases proper to plead it, would be to embarrass the proceedings with technicalities, which the Legislature seem to wish to avoid.

The Circuit Court might, no doubt, make rules to require the party to give this sort of evidence before the cause had proceeded in chief, but the Court has not done so, and the practice is otherwise. With regard to the second point, which is, that the party should swear to his abatable defence, it seems to us to be sufficient to say that the law only requires this where the pleas are written in form, and in cases where formality is required. In cases where the affidavit is required to pleas in abatement, the party offering the plea must swear to the same, and the reason is.

because the plea is dilatory, and is calculated to delay the trial on the merits till the plea can be disposed of; and then if the plea is adjudged bad, the defendant will be required to answer over.

In the case before the Court no delay of the trial on the merits is produced, for the plaintiff had given his evidence in chief.

(203) The judgment of the Circuit Court is affirmed with costs.

Currin v. Ross & Glasgow.

1. Under the act simplifying proceedings at law, the defendant is allowed six days to plead as in other cases.
2. Error in taking judgment by default before the time of pleading expires, is not cured by opening the judgment on the motion of the plaintiff, unless the defendant has notice thereof.

Tompkins, J., delivered the opinion of the Court.

This is an action commenced by Ross and Glasgow against Currin under the act entitled an act to simplify proceedings at law for the collection of debts.

On the second day of the term the plaintiffs took judgment by default against the defendant, and on the same day the defendant moved to set this judgment aside, and for leave to file the plea of *nil debit*. This motion was overruled. On the third day of term the Court, on the plaintiff's motion, set aside the judgment by default, and the cause remained open till the 9th day of the term, when no plea being filed the plaintiff again took judgment by default. To reverse this judgment, the defendant has come into this Court.

The plaintiff in error admits that judgment by default might have been entered against him on the third day, and contends that he had all the second day to plead in. The defendants in error seem to admit that the judgment by default was taken too soon. For on the third day of the term they move to set aside their own judgment and leave the cause open till the ninth, and contend that the first error was thus cured, the other party having it in his power to come in and plead.

It does not appear that the plaintiff in error had notice that this judgment by default was set aside. The belief that the defendant was bound to plead on the second day, seems to be produced by the language of the fourth section, viz: "that the petition and summons shall not go to the rules, but the proceedings shall be had in Court, and shall be docketed the second day." The marginal note is "set for trial second (204) day." This note, (it is almost idle to say it,) is no part of the law. Surely it

cannot be inferred from this section of the statute that the pleadings must be made up on the second day. And it is still more extraordinary that those words should be construed to mean, "set for trial on second day." "Docketed to the second day," must mean, docketed on the second day, in order that the parties may know the trial day. In the third section it is provided, that the defendant shall appear and answer on the second day, and in the fifth section this day is called the return day.

When suits are brought in the ordinary way, that is, under the act to regulate proceedings at law, the return day is the first day of the term, and the defendant is on that day required by the language of the summons to appear and answer. In the fourth section of the last mentioned act are these words: "and such writs shall be served at least fifteen days before the return day thereof," which means the first day of the term, and all writs must be served at least fifteen days before the first day of the term. And by the fifteenth section, the defendant is allowed till the sixth day to plead. By the sixth section of the act to simplify proceedings at law, it is provided that the defendant may appear and plead, and then join issue "joined as in an action of debt on such bond or note." If the defendant be allowed to plead, he ought to be allowed time to plead; and there is no reason why he should not be allowed as much time to plead to a petition and summons, as to an action of debt, which is six days, if the term shall be so long continued, and the act itself being silent as to the time of pleading, it is but reasonable to make the rule of practice in such suits conform to the rule prescribed in the action of debt.

It is not a forced construction that the words, "as in an action of debt on such bond or note," should refer as well to the time and manner of pleading, as to the joining of issue. With this construction of the statute we are better satisfied, for two reasons: First. The Clerk is directed by the 27th section of the act to regulate proceedings at law, to set all causes for trial at least sixty days before the first day of the term, "specifying the day on which each cause is to be tried," and the witnesses are to be summoned to attend on the proper days. Thus the second day will be disposed of sixty days before the first day of the term, and for forty-five days after suits by petition and summons may be brought, and for what purpose should they be set for trial on the second day? For if any thing more than docketed on the second day is meant by the words of the 4th section "docketed to the second day," that (205) meaning must be *set for trial*, as is the marginal note.

The consequence would be, that the Clerk in setting his causes for trial, must always leave open the second day, when he might not have a single petition and summons to fill it with. It seems a reasonable construction that the Clerk should docket the causes on the second day of the term, which is the return day, and consequently the first day that the law puts them in his power; and it seems, too, that he must necessarily docket them after the causes continued from the last term. Second. It is a reasonable conjecture that the second day, or any one day, should not suffice for the suits of that kind, that might be brought in some counties.

The judgment by default seems, then, to have been improperly taken on the second day. Was the error cured by opening the cause? The plaintiff in error, for any thing appearing on the record, was not in Court, and knew nothing of it. We think the error is not cured. Had it not appeared on the record that the term of the Court continued several days longer, the decision might have been different. It may perhaps give the Court some trouble in short terms, to give effect to the law which

allows six days to plead, if the term so long continue; and also, to give the plaintiff judgment. But this cause presents no difficulty.

The judgment of the Circuit Court is reversed, and the cause remanded for further proceedings, in conformity with this opinion.

WARDER v. EVANS.

1. Debt on judgment. The declaration set forth a judgment for $420 52, and also for the further sum of $17 61 for costs. The record was a judgment for $420 52, "and also for his costs by him in this suit in this behalf expended." Held, that there was no variance, as it appeared from the record that the costs had been taxed and certified by the Clerk of the Court in which the judgment was rendered.
2. A defendant cannot plead a lost release.
3. A demurrer only admits matters that are well pleaded.

APPEAL from Lafayette Circuit Court.

TOMPKINS, J., delivered the opinion of the Court.

This was an action of debt founded on a judgment rendered in Kentucky against the defendant. Pleas, payment, release, and *nul tiel* record. To the pleas of payment and release, demurrers were filed, and issue taken on the plea of *nul tiel* record. Judgment was given in the Circuit Court for the plaintiff, as well on the issues of (206) law as of fact; and to reverse this judgment the defendant prosecutes his appeal.

On the record it appears that the declaration states a judgment for $420 52 1-10, and also for the further sum of $17 61 for his costs. The judgment is for $420 52 1-10, and also for his costs by him in this suit in this behalf expended. It appears further from the bill of exceptions in this cause, that the costs of the suit in Kentucky, as taxed by the Clerk, and certified in the record here declared on, amount to $17 61, the amount claimed for costs in the declaration.

The appellant, by his counsel, contends that this is such a variance as is fatal, and relies on the case of Ferguson *v.* Frizel and others, page 441 of 1st vol. *Decisions of Sup. Court of Missouri.* In that case the declaration is for $175 debt, $11 damages, and for $19 43 1-2 for his costs. The judgment given in evidence is for $175 debt, $11 damages, and for his costs and charges, &c. This variance between the allegation in the declaration and the record offered in evidence in that case, was held fatal. And it may be observed, that had it appeared on the record then before the Court, that the costs had been taxed and certified by the Clerk, as in the present case now

before the Court, the decision would probably have been different. We do not see, from the opinion, that the costs had been taxed and certified by the Clerk of the Court, that rendered the judgment declared on in that case. The taxing of costs is a ministerial duty of the Clerk, and when it is performed, the amount of costs for which the judgment is rendered is as well ascertained as if it had been set down in so many words by the Court. The costs are taxed and certified along with the proceedings of the Court; and we think that the appellee declared well for costs *in numero*, and that it was not necessary that he should aver the costs amounted to $17 61, as contended by the appellant.

The appellant abandons his plea of payment, but contends that the release was well pleaded. In Dunklin and others v. McKee, it was decided that an action could not be maintained on a lost bond: see 1 *Mo. R.*, 123. If a plaintiff cannot sue on a lost bond, we see no reason why a defendant should be allowed to plead a lost release. But the appellant contends that the want of profert in his plea, is, by statute, a subject of special demurrer only, and that he ought not to be in a worse situation than if he had pleaded without making that excuse. Had he pleaded without mak- (207) ing profert or excuse of profert, the appellee, plaintiff in the Circuit Court, must either have demurred specially, or have taken issue. Had he demurred specially there would have been an end of the matter; and had he taken issue, the defendant (appellant here) must have taken a non-suit on the trial before the jury, as he would have been able to produce no evidence to sustain his plea. But he has chosen to disclose in his plea that he has no defence, and the appellee very properly demurred. But the counsel for the appellant contends that the appellee, by his demurrer, has admitted there was a release, and that it was lost. It is understood that by a demurrer, every thing well pleaded is admitted, and nothing more. Were it otherwise, a man who never had a release might plead one with this excuse of profert, and the consequence would be, that the plaintiff would be reduced to the necessity of taking issue on the matter of fact, which, when established, would only prove that the appellant's defence was in another Court. This is as well known on his disclosure of the loss in his plea as after trial by jury. Surely it could never be intended by the law making power, to compel the plaintiff to have that proved by a jury, which the defendant admits. If it were so, the plaintiff would be punished for the misfortune, negligence, or dishonesty of the defendant. The case of Moore's executors, 2 *Bib.* 330, referred to by counsel, seems to us to have no bearing on the present case.

The judgment of the Circuit Court is affirmed, and this Court award to the appellee five per cent. damages on the amount of his judgment in the Circuit Court.

(*a.*) See Wash v. Foster, 3 Mo. R., p. 205.

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REVIS *v.* LAMME & BROTHES.

Parties are bound to set out their names. Lamme & Brothers is not a proper description of the plaintiffs.

ERROR from the Boone Circuit Court.

M'GIRK, C. J., delivered the opinion of the Court.

Lamme & Brothers brought their action of debt before a Justice of the Peace on a note made by the defendant to one Mark Revis, and assigned by him to Lamme & (208) Brothers, by the name of Lamme & Brothers, and by no other name. The summons is to answer to Lamme & Brothers. The plaintiffs before the Justice had judgment, and the defendant appealed to the Circuit Court. When the cause came into the Circuit Court, the appellant moved the Court to reverse the judgment and to quash the summons, because the names of the plaintiffs were not given; which motion the Court overruled, and gave judgment for costs. The appellees then moved the Court to dismiss the cause from the docket, because, as they alledged, the judgment before the Justice was rendered by default, and, therefore, no appeal could lie till the party had first moved the Justice for a new trial, which was not done. The Court sustained this motion, and dismissed the cause, and gave judgment generally in the case for costs. As to the last motion, it will be enough to say, that the record does not show that the judgment before the Justice was by default. The last motion was predicated on a fact not supported by the record. So that no question can arise as to the propriety of the appeal.

The case being dismissed, we will not order it to be reinstated. Where the proceedings are by writ of error, a mandamus would no doubt be an appropriate remedy. See the case of Chambers *v.* Astor, 1 *Missouri Rep.* 327. But here there is a judgment for costs, and a motion to quash proceedings has been overruled. These things are fit subjects for a writ of error to operate on.

The only point arising out of the case is, did the Court err in refusing to quash the summons and proceedings? This Court is well satisfied that the Court erred on this point. The law requires that the parties should set out their names. If the suit had been in the name of Lamme & Co., it would clearly have been bad; and in this case it is as bad, if not worse. Lamme & Brothers is no proper description of the plaintiffs.

The judgment of the Circuit Court, so far as that Court refused to quash the summons and proceedings had before the Justice, and so far as respects the costs, is reversed. The plaintiff in error recovers the costs of the writ of error.

(209) THOMPSON v. CURTIS.

1. An appeal from a Justice of the Peace, on a judgment by *nil dicit*, is good without a motion for a new trial.
2. After an appeal is dismissed, the Court cannot render judgment for the debt, &c. (Note *a*.)

ERROR from Ray Circuit Court.

M'GIRK, C. J., delivered the opinion of the Court.

This was an action of assumpsit brought on a note by Curtis against Thompson, before a Justice of the Peace. On the trial day the parties appeared, and the note being produced, the defendant said nothing in defence of the action. Judgment was given against him; he appealed to the Circuit Court. When the cause came there, the appellee, Curtis, moved the Court to dismiss the appeal. The Court sustained the motion, dismissed the appeal, and then gave judgment for the amount of the debt, costs, &c. To reverse which, the cause is brought here. It is assigned for error, that the Court dismissed the appeal contrary to law. And secondly, that the Court erred in entering up judgment for the debt and costs, after the appeal was dismissed. The reason alledged for dismissing the appeal was, that it was taken and allowed contrary to law. The law not permitting an appeal till a motion is made for a new trial, and that is refused. Whereas, in this case, the judgment was by default. The record shows that the defendant appeared and said nothing.

It is argued by Mr. Rees for the defendant in error, that a judgment by *nil dicit* is a judgment by default, as much so as where the party never appeared.

It is admitted by this Court that it is a judgment for default of defence, and so is a judgment after a demurrer. There the entry is, that the action remains undefended, and says nothing further. It seems clear, upon a view of the statute, that the sort of default contemplated by the statute, in such a case as this, is a default of appearance. By the 12th section of the same act, the Legislature say, that if the defendant fails to appear on the return day of the summons, and it shall appear that he has been legally served with process, and the plaintiff's demand is founded on a note, &c., it shall be lawful for the Justice to give judgment by default, &c. This shows the sort of de-
(210) fault the act intends in the 22d section, where it is said, if the judgment is by default, there shall be no appeal till the defendant has applied to have the judgment set aside, and that has been refused.

With regard to the other point, was it right to give judgment for the debt after the cause was dismissed? We are unable to discover the principle on which this judgment can be sustained.

The judgment of the Circuit Court is reversed, with costs.

(*a*.) See Barrs *v*. Holland, 3 Mo. R., p. 47.

THE STATE *v.* FOSTER.

1. **The arrest of a judgment is a final decision, and a writ of error will lie thereon.**
2. **An indictment, charging the defendant did suffer a gambling device to be set up and used in his house, at which a game of chance called Loto was played, &c., is good.**

ERROR to Saline Circuit Court.

TOMPKINS, J., delivered the opinion of the Court.

The defendant was indicted in Saline Circuit Court for suffering a gambling device called a Shuffle Board to be used at his house, at which a game of chance called Shuffle Board was played for money and property. Plea not guilty. Verdict guilty. The judgment was arrested, and thereupon this writ was sued out.

The defendant in error insists that there is here no judgment, and that consequently the writ of error does not lie. The language of the statute is, "that writs of error on the final decision or judgment of the Circuit Court, shall issue on demand as a matter of right. The act of the Court arresting the judgment is a final decision, and is virtually an acquittal (for the time present) of the defendant." It is the opinion of this Court that the writ of error well lies.

The defendant's counsel did not contend that the indictment was defective. The Court, however, have inspected the indictment, and believe it to be good. See Lowry *v.* State of Missouri, p. 724 of the printed decisions of this Court. The indictment in that case charged that the defendant, Lowry, did suffer a gambling device to be set up and used in his house, at which a game of chance called Loto was played, (211) &c.; and the offence was decided to be well charged. This indictment is almost a copy of that decided to be good by the Court sitting at St. Louis.

The decision of the Circuit Court of Saline county, arresting the judgment in this cause, is reversed., and this Court proceeding to give such judgment as the Circuit Court ought to have given, do assess the fine of the plaintiff in error to $50, &c.

ALEXANDER v. HAYDEN.

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1. The Court can assess damages without the intervention of a jury if neiher party require one.
2. In an action on an assigned note, the plaintiff need not show that he sues in the character of assignee.
3. The Supreme Court considers nothing as error which has not been decided on below.

ERROR from the Circuit Court of Howard county.

M'GIRK, C. J., delivered the opinion of the Court.

Hayden brought an action of assumpsit on a writing for the payment of $80, in commonwealth's paper. On the declaration an attachment was sued out, and after an order of publication the defendant not appearing, judgment was rendered for the plaintiff. The defendant brings a writ of error to reverse this judgment. Mr. Wilson, counsel for the plaintiff in error, assigns for error, first, that the affidavit is insufficient. And secondly, that the order of publication is insufficient. And thirdly, that the Court erred in assessing the damages without the intervention of a jury.

We will notice the third error first. The statute of the State regulating the practice at law, says, that if neither party require a jury, the Court shall assess the damages, &c. The attachment law provides that if the damages are liquidated, or are ascertainable by a writing, then the Court shall assess the damages, otherwise a writ of inquiry shall be awarded. In this we are satisfied no writ of inquiry was necessary.

The next error we will consider is, whether the order of publication was sufficient. The law requires that the publication should notify the defendant that a suit has been commenced, and shall show the nature and amount of the action. The law says the (212) publication shall show the nature and amount of the action. This would seem to be sufficient. But the plaintiff's counsel contends, that as in this case the plaintiff sues on an assigned instrument, that the notice should show that the plaintiff sues in his character of assignee. This Court is of a different opinion. The only question to be considered is, the extent and meaning of the words: the nature of the action. The form of the action shows as much of the nature as the law requires. The nature and distinctive character of assumpsit are clearly seen, when put in contradistinction to trespass, *vi et armis*, covenant or debt; and though in this case the defendant may know he never made any assumpsit to the plaintiff, yet if he made an assignable instrument he must know that very instrument may have come into the hands of the plaintiff. There is nothing in this objection. The last error is, that the affidavit is insufficient. The sufficiency of the affidavit will not be considered, because the law is, that the Supreme Court shall not consider any matter as error, other than that expressly decided on by the Court below. Nothing appears by the record which shows that there was any decision made by the Circuit Court on the sufficiency of the affidavit. It does not appear that the attention of that Court was ever called to that point. It is the business of the plaintiff to see that his affidavit is suffi-

cient, for in *exparte* proceedings the plaintiff in every step he takes, acts at his own peril, and the Court will only watch over the proceedings with common care, and not like hired counsel would. In this case the affidavit is the act of the party, and may be brought before the Court on a motion to dissolve the attachment. And after the cause is ended, it may be brought before the Court on a motion made by the defendant to set aside the proceedings for irregularity, and if this motion is improperly refused, and the matter is properly saved by a bill of exceptions, there can be a redress by a writ of error.

According to this view of the record and the case, the judgment of the Circuit Court is affirmed.

Decisions of the Supreme Court of Missouri,

ST. LOUIS DISTRICT, SEPTEMBER TERM, 1830.

Miller *v.* Conway.

A person injured or defrauded by any fraudulent conveyance, may maintain an action of debt for double damages against the parties privy thereto, before conviction of the criminal charge.

ERROR to St. Louis Circuit Court.

Tompkins, J., delivered the opinion of the Court.

This is an action on the case, founded on the 39th section of the act concerning crimes and misdemeanors. It was brought to recover damages for loss which the plaintiff alledges he sustained by the fraudulent conduct of the defendant. After verdict for the plaintiff below, the Court arrested the judgment, because there was no conviction of the defendant alledged in the declaration.

The defendant in error insists that the true construction of the statute requires that such conviction should be stated in the declaration, and that the declaration is erroneous in stating several distinct causes of action in one count. On this last reason for sustaining the judgment of the Circuit Court, the counsel have not insisted.

The action is founded on the 39th section of the act concerning crimes and misdemeanors. The words are: "that all and every the parties and others being privy to any fraudulent conveyance of any lands, &c., he, she or they so offending shall, on conviction, be fined in a sum not exceeding one thousand dollars; and shall, moreover, be liable to any and every person who may be injured or defrauded by any of the (214) means aforesaid, in double damages, to be recovered by action of debt, or on the case, in any Court having jurisdiction thereof."

The Court is inclined to the opinion that the Legislature did not intend conviction of the criminal charge to precede the action for damages. If we regard the con-

struction of the sentence, the sense seems plain, "shall on conviction be fined in a sum," &c., "and *shall moreover be liable.*"

But it might be asked for what purpose should conviction precede the action for damages, and be alledged in the declaration. If it be a material allegation, it must be proved. Certainly every rule of evidence would be violated by making the record of conviction evidence of the plaintiff's right to recover in a civil action.

The judgment of the Circuit Court is reversed, and the cause remanded for further proceedings in conformity with this opinion.

VINCENT, (A MAN OF COLOR,) *v.* DUNCAN.

1. A negro may be hired to work at the Saline in Illinois for twelve months without becoming free.
2. A negro hired in good faith to work at the Saline for one year, may at the end of that year be hired a second, without working his freedom.
3. An involuntary escape of the negro at the end of twelve months, will not cause a forfeiture.
4. If the owner of slaves take them into Illinois with intent to reside there, and do reside there, keeping the slaves, they become free.
5. If the owner stay in Kentucky, and send his slave to work in Illinois, he becomes free. (Note *a*.)
6. A slave is incapable of acquiring a permanent settlement or regular domicil by residence.
7. The Constitution of Illinois cannot be controlled by the ordinance of 1787.
8. The admission of A. that he is a slave, is no evidence against him in a suit for freedom.
9. A slave who resided at the Ohio Saline as a laboror, in the year 1817, is entitled to his freedom.

ERROR to St. Louis Circuit Court.

TOMPKINS, J., delivered the opinion of the Court.

This is an action for freedom under the statute of this State, brought by Vincent (215) against Duncan. The defendant pleaded the general issue, and that the plaintiff was a slave. On both which pleas issue was joined and found for the defendant, and judgment was given accordingly. To reverse this judgment Vincent has brought up this case by writ of error.

It was in evidence that the plaintiff had been hired to labor at the Illinois Saline, near Shawneetown, from the year 1817 till the year 1825, when he was taken and

carried bound to Kentucky; that he was the reputed slave of a family in Kentucky by the name of Duncan. That John Duncan, and sometimes the defendant, were in the habit of going to the Saline aforesaid, and hiring the plaintiff out and receiving pay for his hire. That the plaintiff, after remaining there some time, became disobedient to James Duncan, and discovered an unwillingness to go to Kentucky with James Duncan, and on some pretence got permission of James Duncan to stay at the Saline to settle his affairs; that finally he was taken and carried by force as above mentioned. That in 1826 he was delivered by John Duncan to the defendant, to be disposed of at the defendant's pleasure. That since the plaintiff had been in St. Louis, he had admitted himself to be the slave of James Duncan.

The Court instructed the jury that by the Constitution of Illinois, the plaintiff might lawfully have been hired at the Ohio Saline in Illinois, from year to year, without being removed to any other State at the end of each year, without "*working*" his emancipation.

Second. If the jury are satisfied that the owner of Vincent, residing in Kentucky, desired to withdraw him from the Saline, and attempted to do so, but was prevented by Vincent, that in such case Vincent cannot recover.

Third. That under the ordinance of 1787, the bare fact that Vincent wrought at the Illinois Saline, from 1817 till 1825, does not work his emancipation.

Fourth. That under the ordinance of 1787, the plaintiff cannot lawfully claim his freedom by reason of any residence in Illinois, which does not amount to a permanent settlement and the acquisition of a regular domicil there.

Fifth. That the Constitution of Illinois is not and cannot be controlled by the ordinance of 1787, as to the existence of slavery within that State.

Sixth. That if the jury shall be of opinion that the plaintiff constantly, down to the fall of 1829, when this suit was brought, acknowledged himself a slave, such (216) evidence is legal and valid, and they may find their verdict upon it.

These instructions are assigned for error.

First. By the Constitution of Illinois, negroes may be hired to work at the Saline if they be not hired for more than twelve months at a time. If a negro were really hired to work at the Saline for five years, the fact that the negro, at the end of each year, was removed over to Kentucky, and afterwards brought back, would not cure the fraud. We conceive then that if the negro were in good faith hired there for one year only, that at the end of the first year he might be again hired another year, without being taken across the line of the State.

In this instruction, then, nothing wrong is seen.

Second. If the owner of Vincent could lawfully hire his negro for twelve months at the Saline, an involuntary escape of his negro at the end of the year would hardly be construed to cause a forfeiture: but it could hardly be conceived that the evidence here given could warrant such an instruction. It rather appears that the negro was unwilling to go, and the master was unwilling to use force.

The instruction then is wrong.

Third. Nothing can be conceived more vague than the instruction here asked. The ordinance was made to prevent the introduction of slaves into the Territory of which Illinois was then a part. This Court has several times decided, that if the owner of slaves took them with him into Illinois, with intent to reside there, and did reside there, keeping his slaves, it was a fraud on the ordinance, and the slave became free. If he stay in Kentucky, and send his slave over to Illinois to reside there, it is

equally a violation of the provisions of the ordinance. The evidence here is, that his owner hired him to labor there. Had the negro eloped from his master and gone over to Illinois without his owner's knowledge or consent, the case is provided for by the act itself. The state of the case did not warrant the instruction. It might mislead the jury, and is wrong.

Fourth. The object of this instruction is not easily perceived. It appears to the Court that a slave is not capable of acquiring either a permanent settlement or regular domicil by residence. This instruction is also unwarranted and erroneous.

Fifth. This instruction is not erroneous.

Sixth. Any fact admitted by the plaintiff might be given in evidence against him, and he would be reduced to the necessity of disproving such fact; but whether he be a slave or not, is a conclusion of law from certain facts which may or may not exist. Such an admission, made even by a lawyer, would be no evidence.

(217) This instruction was surely wrong.

The counsel for the plaintiff prayed the Court to instruct the jury, that if the plaintiff resided at the Ohio Saline as a laborer, in the year 1817, by the consent of his master, he was entitled to his freedom This instruction was refused. The Constitution of Illinois was adopted in Dec. 1818, and it was in evidence that the plaintiff was hired at the Saline in 1817, and remained hired there till 1825. This instruction ought to have been given. The judgment of the Circuit Court is reversed, and the cause is remanded for further proceedings in conformity with this opinion.

(a.) See Wilson v. Melvin, 4 Mo. R., p. 595.

McDonold v. Franklin County.

1. Commissioners are not liable individually, when they have complied strictly with the law of their appointment.
2. A contract made by Commissioners with legal authority on account of a county, will be enforced. (Note a.)

ERROR from St. Louis Circuit Court.

Wash, J., delivered the opinion of the Court.

This was an action of assumpsit brought by McDonold against the county for the building of a Court House. The Commissioners appointed by statute let out the building as directed by law, and McDonold became the lowest bidder. He executed a bond for the faithful performance of the work, and the Commissioners, styling

themselves "Commissioners of Franklin county," gave him two promissory notes for the amount of his bid, one of which is the foundation of the present suit. The declaration contains six counts. The four first on the note, the fifth on the special verbal contract of letting, and the sixth on an account stated. The defendant pleaded non-assumpsit generally, and had verdict and judgment in the Circuit Court, to reverse which the plaintiff now prosecutes his writ of error. The evidence given on the trial is preserved by a bill of exceptions, and shows amongst other things, that the Commissioners appointed by the act of 1818, erecting the county of Franklin, in pursuance of the authority given them in said act, proceeded to select a site for the county seat, laid out and sold a number of lots in the new county town; built a jail and paid for it from the proceeds of the lots sold, and having a surplus in their hands, after paying for the jail, of some seven or eight hundred dollars, proceeded to (218) build a Court House, and entered into the contract sued on. The funds arising from the sale of lots proved insufficient to pay for the Court House, and the county now insists that it is not liable for the balance. In comparing the evidence with the statute it will be seen that the Commissioners pursued strictly the law of their appointment. The act prescribes no mode in which they shall contract for the county, but directs that the money arising from the sale of lots, shall be first applied to the building of a jail, "and the remainder, if any, shall be by them applied towards building a Court House and other public buildings," &c., leaving the Commissioners to select such mode of contracting and exercising their powers as might be convenient and proper.

The law of this case is correctly settled in the suit of Laughlin et al. *v.* McDonold, which was brought to recover the amount of the note sued on in the present case, from the Commissioners in their individual characters, on the ground that they had exceeded their authority, and which, after recovery in the Circuit Court, was brought up to this Court and reversed. That case, as well as the present, is clearly distinguishable from that of McClintic *v.* Fort Summers et al., decided by this Court, on which the defendants rely.

In the latter case the Commissioners named in the act establishing the county of Montgomery, proceeded without regard to the law of their appointment, and on that ground were made responsible in their individual characters. In the present case it is shown that the Commissioners conformed strictly to the law, and for that reason could not be made liable, but have bound the county by their contract. It would be a stigma upon the law if a contract made by the Commissioners in the strict line of their duty, and by legal authority, for and on account of the county, and of which the county has derived the benefit, could not be enforced.

The judgment of the Circuit Court is erroneous, and is therefore reversed with costs, and the cause remanded to said Circuit Court to enter up judgment in conformity with this opinion.

(*a.*) See Ruggles *v.* Washington county, 3 Mo. R., p. 496.

THE STATE v. HENRY, (A SLAVE.)

A bill of exceptions does not lie in criminal cases.

ERROR to St. Louis Circuit Court.

TOMPKINS, J., delivered the opinion of the Court.

This was an indictment in the Circuit Court of St. Louis county to which the de-
(219) fendant pleaded *not guilty*. On the trial the State produced a witness named Joseph Lee, a colored man, who was alledged to be the owner of the property charged to have been stolen. He testified that he was a barber in the city of St. Louis, and kept a shop for carrying on his trade: that the prisoner had frequently been in his shop and knew the situation of the different articles therein, and in the absence of the witness frequently sold articles for him. He further stated that some time within a year before the trial, a bottle of Cologne water of the value of one dollar had been stolen from his shop, and that he charged the prisoner with taking it; but the prisoner denying the taking, the witness told him he could prove it. The prisoner then admitted he had taken the bottle of water, and offered to pay the witness one dollar for it. The witness refusing to receive the pay, insisted on having the bottle returned, and it was accordingly delivered to him by the prisoner. No other evidence of the freedom of Joseph Lee was offered. The counsel for the prisoner moved the Court to instruct the jury to find for the prisoner, because there was no competent evidence of the fact that Joseph Lee, who is charged in the indictment to be the owner of property therein mentioned, is a free man. The Court gave the instruction, and the State excepted to the opinion and instruction of the Court. The prisoner being acquitted, a writ of error is prosecuted to reverse the judgment of the Circuit Court. The counsel for the prisoner did not argue this case. By the Circuit Attorney, two points are made:

First. That the evidence was competent and improperly excluded.

Second. That a bill of exceptions lies in a criminal case.

First. The Court thinks that the testimony was competent, and the instruction improperly given.

It is not necessary to say whether property in the charge of a slave could be properly charged in an indictment to be his property, for it does not appear that Joseph Lee was a slave; but his keeping a barber's shop and selling articles in that shop is such evidence of freedom as ought to have gone to to the jury.

Second. At common law the bill of exceptions does not lie. The statute gives it only in civil cases.

The opinion of the Court is, that the writ of error be dismissed.

(220) CARTMILL *v.* HOPKINS.

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1. An instrument of writing will not be considered sealed, unless by some expression in the body of the instrument itself, the maker should show that he intended it to be considered a specialty. (Note *a*.)
2. A simple removal from a State where a contract was made, to another State, will not, of itself, prevent the running of the statute of limitations. (Note *b*.)

ERROR from St. Louis Circuit Court.

WASH, J., delivered the opinion of the Court.

This was an action commenced before a Justice of the Peace. Judgment was given by the Justice for the plaintiff. The defendant appealed to the Circuit Court, where upon a trial *de novo*, judgment was rendered for the defendant; to reverse which the plaintiff has brought his writ of error into this Court. As appears from the bill of exceptions, the case was submitted to the Court on the following case agreed between the parties. "That the instrument sued on (a copy of which is set forth in the summons issued by the Justice before whom this cause was commenced) was made in the State of Kentucky, where the parties then resided, and where the plaintiff still resides. That the defendant, about the time the money in the instrument sued on mentioned became due, as early as April, 1819, removed from the State of Kentucky and settled at Edwardsville, in the State of Illinois, where he continued to reside until some time in the year 1827, when he removed from Edwardsville, Illinois, to St. Louis, in the State of Missouri. On this state of facts, the defendant insisted on the statute of limitations as a bar to the plaintiff's action. And the plaintiff contended and insisted that the plea was bad, because the action was founded on a sealed instrument, and that even if the Court should be of opinion that the instrument sued on was not under seal, the defendant ought not to be permitted to plead the statute of limitations in bar." The Court decided that the instrument sued on was not under seal, and that the statute of limitations was a good plea in bar." There is nothing to show that the original note or obligation sued on was ever before the Court. It is no other way described than as "the instrument sued on, (a copy of which is set forth in the summons issued by the Justice before whom this cause was commenced)." In referring to the copy of the note, as copied into the record from the Justice's summons, we find it set out in the following words and figures: "On or before the first day of April next, I promise to pay Thomas Cartmill, or order, one hundred dollars, for value received this 24th day of April, 1818.

WM. H. HOPKINS, [L. S.]

Attest, STEPHEN MACFORLAND.

(221) The Circuit Court ought unquestionably to have had the instrument before it in order to have determined whether it was sealed or not. No copy made by the Justice, however accurate a *fac simile*, would answer. It might be sufficient on this point alone to dispose of the cause, but two other questions have been presented, which it may be well to settle.

First. Is the instrument, as set out and described in the summons of the Justice, a sealed instrumsnt? And second, did the removal of the defendant prevent the running of the statute of limitations in his favor?

The doctrine in Virginia on a statute similar to our own in regard to scrawls, (1 *Wash.* 270, 1 *Munford* 490, and 2 and 4 *Munford* 442,) as cited and read by the defendant's counsel, seems to us the true doctrine.

The maker of an instrument should show by some expression in the body or *testimonium* of the instrument itself, that he intended it to be considered and taken as a specialty. As to the second point, since the case of Bobb and Shipley, decided by this Court, it has been considered settled that a simple removal from the State where a debt was contracted, to another State, would not of itself prevent the running of the statute. It might or might not defeat or delay the bringing of the plaintiff's action. The case of M'Hugh and Hancock, also decided by this Court, and which has been relied on by the plaintiff's counsel, is not thought to conflict with that of Bobb & Shipley. Under this view of the case, the action was barred before the act of 1825, and the other points in the cause need not be noticed. Upon the whole, the judgment of the Circuit Court is affirmed, with costs.

(*a.*) See Boynton *v.* Reynold's, 3 Mo. R., p. 79; Grimsley *v.* adm'r. of Riley, 5 Mo. R., p. 281.
(*b.*) King *v.* Lane, 7 Mo. R., p. 241.

Decisions of the Supreme Court of Missouri,

FAYETTE DISTRICT, OCTOBER TERM, 1830.

HAYS *v.* WALLER.

1. In a civil action for a malicious prosecution, the defendant may give evidence of what he swore on the trial of the indictment. (Note *a*.)
2. Testimony, showing that a witness swore differently on a former occasion, is admissible. (Note *b*.)

APPEAL from the Circuit Court of Jackson county.

M'GIRK, C. J., delivered the opinion of the Court.

This was an action brought by Hays against Waller for a malicious prosecution: not guilty was pleaded, and issue thereon. The first error complained of is, that the Court permitted the defendant to give evidence as to what he swore before the Justice who took the original examination; and secondly, the Court erred in permitting testimony to go to the jury, to show that Polly Medlock, a witness for the plaintiff, had sworn differently before the Justice on the original examination.

It is contended on the part of the appellant, that the law will not allow the prosecutor, when defendant in a civil action for a malicious prosecution, to prove what he swore on the trial of the indictment, unless the offence was committed when no one was present but the prosecutor, and that, therefore, the rule of necessity alone must govern the case, and that in this case it is apparent on the record, that Polly Medlock was present when the supposed offence was committed, as well as the prosecutor.

If the rule above given be the true rule, yet the Court did not err in admitting the prosecutor's testimony, for it appears by the record, that after the hog was killed, cleaned and hung up, she did not see it any more, and that when hung up, it had the ears on; then the prosecutor swore that when the hog was hung up, the ears were

on, and that he then went away for a short time, and when he returned the ears were cut off, so that it is apparent that none could swear to the fact of the ears being cut off but the prosecutor.

(223) Admitting the rule to be correct, as contended for by the appellant, the Court did not err on this point. It is laid down in many books, that if no one was by when the offence was committed, the defendant in the civil action may give evidence of probable cause, and that acquits him at once; and that to do this, he may prove what he swore on the trial of the indictment. (See *Bul. N. P.* 14, *Peake's Evi.*, top page 350.) On this objection there is no error.

The next objection is, that testimony was admitted to show that a witness swore differently on a former occasion: we see no objection to this. It surely is law to attack the credit of a witness by showing that he stated or swore differently on some other occasion: there is no error on this point.

The judgment of the Circuit Court is affirmed, with costs.

(*a.*) See Hickman *v.* Griffin, 6 Mo. R., p. 41.
(*b.*) See Garrett *v.* The State, 6 Mo. R., p. 1; Abel *v.* Shields, 7 Mo. R., p. 120.

JOHNSON *v.* White.

1. A contract for two dollars and forty pounds of beef is not entire in its nature.
2. On a contract to pay money and property, debt will be sustained for the amount of money.
3. An order for money and property is divisible.
4. The Court gave judgment without finding a verdict—held not erroneous.

ERROR from the Circuit Court of Howard county.

M'GIRK, C. J., delivered the opinion of the Court.

This was an action of debt, originally commenced before a Justice of the Peace. Judgment was rendered for Johnson, the plaintiff, and the cause was taken to the Circuit Court by appeal. The defendant, White, had judgment. The cause is brought to this Court by Johnson, by writ of error. The summons is in debt, without saying whether the debt was due by note, bond, or otherwise; and on the trial before the Circuit Court, the plaintiff gave in evidence an order drawn in favor of Johnson by White, on some third person, for two dollars, and also for 46 lbs. of beef. To the introduction of this paper the defendant objected, on the ground of variance, and also on the ground that the beef and the money formed one entire contract, and that

debt would not lie for the beef, insisting there was no proper evidence to sustain the plaintiff's action.

The Court rejected the order. The defendant had judgment.

The rejection of this order is assigned for error. The objections made by Messrs. Reynolds and Davis, counsel for the defendant in error, are against the admissibility (224) of the order, and that the contract is entire, and that debt will not lie on a property note: and secondly, that this evidence amounts to a variance which is fatal. Mr. Wilson, in answer, contends that this contract is divisible, and not entire, and although the beef part of the order does vary from the summons in debt, yet the plaintiff may well recover.

The defendant's counsel, to support their position, have cited 1 *Bibb.* pp. 356, 487; 4 *do.* 359; 2 *do.* 616; 1 *Marshal* 435, and *Hard. R.* 510, in a note. These authorities have been examined by the Court, and are deemed to be insufficient to sustain the positions.

On the side of the plaintiff in error, we are referred to no authorities except 2 *Marshal's R.* 486, Thomas *v.* Thomas. We have also looked into the books on this subject and find that this contract is not entire in its nature. The case in 2 *Marshal's R.* goes the full length to support the plaintiff's case. That was a contract to pay the hire of a negro, and also to furnish clothes to the negro. An action of debt was brought for the hire, and held to be sustainable.

It is to be remarked that in this case the summons of the Justice is not founded on the order at all, nor need it be so founded as the law now stands. The order, therefore, could not vary from any previous allegation. Here there is no allegation other than that defendant owed two dollars. The proof is that he did owe the money and property also. This doctrine is supported by a case put in 2 *Starkie's Evi.* page 85, where it is said: "It is no variance that the defendant promised other distinct matters in addition to that alledged, since the proof supports the declaration as far as is requisite. It is true that the defendant did promise that which is alledged, although he did promise some other thing in addition. Therefore a declaration on a contract to pay £52 10s. for rum money, is supported by proof of a note by which the defendant undertook to pay £52 10s. together with a pint of rum per day. So a promise to deliver a horse which should be worth £80 and be a young horse, is supported by proof of a promise to deliver a horse which should be worth £80 and be a young horse, with warranty that he had never been in harness. These authorities are sufficient.

The only remaining matter is, whether the order for money and beef is divisible. We think the beef is wholly independent of the money.

There was another point made, which was, that the Court found no verdict, but gave judgment without it. There is no error on this point. The judgment is reversed with costs, and the cause remanded for a new trial.

(225) Opinion of TOMPKINS, J.

White gave Johnson, the plaintiff, an order for two dollars and some beef. The order was not paid, and Johnson sued him in debt, as he well might do, for the money due him. The order was produced as a written acknowledgment that White owed him two dollars: and it is no objection to say that White owed more. Had the action of debt been founded on a note for money and beef, it would have been bad. But Johnson, resorting to what may be called the common count, had clearly a right

to sue for a part, and give either this order or a note for money and beef in evidence to establish his demand. I concur with the Court in the opinion that the judgment of the Circuit Court should be reversed.

FORD *v.* THE CIRCUIT COURT OF HOWARD COUNTY.

In criminal cases, except capital, where the fine, penalty or forfeiture, or any part thereof, accrues to the county, the fees for the services of officers and witnesses, where the defendant is acquitted or proves insolvent, shall be paid out of the county treasury.

MANDAMUS to the Howard Circuit Court.

M'GIRK, C. J., delivered the opinion of the Court.

At the last term of this Court, Ford applied to the Court for a conditional mandamus to the Circuit Court, to audit and allow certain fees to him accrued for services rendered for and on behalf of one Hinch, who was indicted for perjury, and who was convicted in the Circuit Court, but the judgment was reversed. The Circuit Court made a return to the mandamus, which is as follows in substance: That these fees were those which had accrued against Hinch by reason of services rendered by the Sheriff for and on behalf of Hinch, and agreeably to the provisions of 30th section of the act of the General Assembly on the subject of fees. The Court considered that said section would not authorize the payment of the defendant's costs out of the county treasury. On this return the plaintiff's counsel moved the Court for a peremptory mandamus.

In considering this point we will notice some of the reasons urged by the Attorney General. It is contended by him that the 30th section of the said act only intends to point out those cases in which the State should pay costs, and those cases in which the county should pay. It is contended by Mr. Givens, for the plaintiff, (226) that the true construction of this section is, that where the defendant is acquitted, the county shall pay all the costs both of the prosecution and of the defendant. The Court is unanimously of the opinion that this is the true construction of he act. The words of the law are: "That in all criminal cases other than capital, and in all cases where the fine, penalty or forfeiture, or any part thereof, on conviction would accrue to any county, the fees of officers and witnesses concerned therein shall be allowed and paid out of the county treasury, if the defendant be acquitted, or where the defendant or his estate is insolvent; and in all capital cases, where the

fine, &c., on conviction would accrue to the State, the fees in case of acquittal or insolvency of the defendant, shall be paid by the State."

Take the case before us and apply this law to it, and it will readily be seen how the matter stands. The law says where the defendant is acquitted, the fees of the officers and witnesses concerned shall be paid out of the county treasury. Here the defendant was acquitted. Then his case is within the very words of the law. But the counsel for the State contends that the expressions in the statute, the fees of officers and witnesses concerned shall be paid out of the county treasury, only means those fees that may be due to the officers for the services rendered to the State, and the fees due the witnesses for the State, and not those of the defendant. The fees of officers and witnesses concerned are the expressions; a witness for the defendant is a witness concerned as much as a witness for the State is. The meaning to us is most clear and obvious.

The peremptory mandamus must go.

THE STATE *v.* HARDWICK.

If the facts be stated as to time or place with repugnancy or uncertainty, the indictment will be bad. (Note *a*.)

ERROR from the Ray Circuit Court.

WASH, J., delivered the opinion of the Court.

This was an indictment in the Ray Circuit Court, for selling goods, wares and merchandise without license, to which the defendant plead not guilty, and on which, at the November term of said Court, 1829, he was convicted. A motion in arrest of judgment was made and overruled, and judgment given for the State; to reverse which the present writ of error is prosecuted.

(227) The indictment charges the offence in the following words: "Ray county to wit: The Grand Jurors of the State of Missouri, for the body of the county of Ray, upon their oath present, that Thomas Hardwick, late of said county, on the first day of November, eighteen hundred and twenty-eight, at the county of Ray aforesaid, with force and arms did deal in the selling of goods, wares and mercandise not the growth, produce or manufacture of this State, at a place occupied for that purpose within said county, without having first applied for and obtained a license for that purpose, agreeably to the provisions of an act of the General Assembly of the said State, entitled "An act imposing a tax on licenses to venders of merchandise

and pedlers, approved February 19th, 1825;" the said Thomas Hardwick not regarding his duty in that particular, but intending to evade the said statute, and unlawfully to defraud the revenue of the said State, did then and there sell to one John Riffle, Sen'r, of the county aforesaid, five yards of cassinett of the value of one dollar per yard; and did then and there sell to one John Riffle, Jun'r, five yards of cassinett of the value of one dollar per yard; and to John Stanley one pound of coffee; and also then and there did sell to divers other citizens of said State, divers other quantities of cassinett, coffee and muslin, and other goods to persons to the jurors aforesaid unknown, without having obtained a license as aforesaid," concluding against the statute. The reasons urged in arrest of judgment in the Court below, and relied on in this Court, are:

First. That it is not shown in the indictment that the defendant had not a license continuing in force.

Second. That in the allegation that the goods sold, &c., the word *and* is put in place of *or* in the statute.

Third. That the first averment after the figures 1825, is not shown to be upon the oath of the grand jury.

Fourth. There is no venue laid to the averment of no license.

Fifth. There is no time laid to the place occupied for selling, &c.

Sixth. There is no venue after the words "force and arms."

Seventh. That the offence is not an indictable offence.

Eighth. The indictment is repugnant and uncertain as to time and place.

As to the first point, it is sufficiently averred that the defendant had obtained no license, and there could be no *continuance* of what had not *commenced*.

There is no force in the second objection; the statute is in the disjunctive, and (228) would punish the selling of either. The indictment charges that he dealt in selling all the articles prohibited, and cannot prejudice the defendant.

As to the third, fourth, fifth and sixth reasons urged, it may be answered that the nicety in pleading which requires the words omitted to be cautiously inserted to every material allegation, is not so strictly observed in indictments for inferior offences, as in cases where the life of the prisoner is in danger: 1 vol. *Chit. Crim. Law*, p. 222, with this further answer as to the fourth reason, that as to a mere omission or non-feasance, no venue need be laid.

As to the seventh point, since the act approved January 22d, and in force the 1st of March, 1829, to amend the act imposing a tax on licenses to venders of merchandise and pedlars, it is very clear that the offence charged is punishable by indictment.

On the eigth point the law is with the appellant. If the facts be stated as to time or place with repugnancy or uncertainty, the indictment will be bad; and if two times or places have been previous mentioned, and afterwards a fact is only laid, "then and there," the indictment is defective because it is uncertain to which it refers: *Chit. Crim. L.* And when a transitory act or matter of indictment is described as having happened at a different county or time, the proper venue of the indictment must be added, or the indictment will be bad. And when two counties are mentioned, as Surry in the margin, and then a fact is described as having happened in Middlesex, and afterwards the offence is stated to have been committed "at the county aforesaid," without showing which county is intended, the indictment will be bad. The case of the King v. the inhabitants of Moor Critchell, in 2 *East*. 66, is

directly in point. The judgment of the Circuit Court is therefore erroneous, and must be reversed with costs.

M'Girk, C. J., dissenting.

I concur in this opinion except as to the eighth point.

(a.) See Jane v. The State, 3 Mo. R., 63.

ALEXANDER v. HADEN.

Where a judgment is rendered in a suit by attachment, on an affidavit not warranted by the statute, the judgment will be set aside for irregularity, even after the lapse of several years.

ERROR from the Howard Circuit Court.

WASH, J., delivered the opinion of the Court.

At the July term of the Howard Circuit Court, 1828, Haden, the defendant in error, instituted suit and sued out an attachment against Alexander, the plaintiff in (229) error, who failed to appear at the return term of the writ. An order of publication was awarded and duly published, and at the November term, 1828, judgment was entered against Alexander, who, at the last July term of said Circuit Court, moved said Court to set aside the judgment and proceedings on account of irregularity. The Court below overruled the motion, and this writ of error is prosecuted to reverse that decision.

The only point made by the plaintiff in error in the Court below, and insisted on in this Court is, that the affidavit on which the attachment was sued out is insufficient. The affidavit is in the following words: Joel H. Haden, pl'ff., *v.* Samuel Alexander, def't. "Joel H. Haden, the plaintiff in this action, makes oath and says, that Samuel Alexander, the defendant in said action, is justly indebted to him in the sum of sixty-five dollars, and this affiant verily believes that the said defendant is not a resident of this State." For the defendant in error it is insisted that the motion in the Circuit Court to set aside the proceedings was made too late. On both points the law is with the plaintiff in error. The affidavit does not conform to the statute, and is clearly defective. The case of Lane v. Fellows, 1 *Mo. R.*, 353, is in point. There is no force in the objection that the motion to set aside for irregularity was made too late. In 7 *John. R.*, p. 556, it is held that after the lapse of

twenty years a judgment ought not to be set aside for irregularity. In 13 *John. Rep.* p. 550, and 2 *Bay.* p. 333, it is held that irregular judgments will be supported in some cases after a lapse of less than twenty years, when attempts are made to set them aside by collateral actions. No precise period seems to be fixed, but all the authorities go to sustain the motion at much later periods than that at which it was made in the case now under consideration. Upon the whole, therefore, the Circuit Court erred in overruling the motion to set aside the judgment for irregularity, and its judgment thereon is reversed, and this cause remanded to be proceeded in in conformity to this opinion.

THOMPSON v. CURTIS.

An appeal from a judgment by *nil dicit*, rendered by a Justice of the Peace is sustainable without a motion and refusal to set aside the judgment.

WASH, J., delivered the opinion of the Court.

At the last term of this Court a conditional mandamus was obtained by Thomp-
(230) son, directing the Judge of the Circuit Court for the county of Ray, in the first Judicial District, to reinstate a certain appeal between Cyrus Curtis, surviving partner of Ely & Curtis, appellee, and the said William P. Thompson, appellant, which at the last March term of the said Circuit Court had been dismissed from the docket of said Court, or to signify the cause why the same could not be done. The Circuit Court refused to reinstate the appeal, and returned for reason wherefore amongst other things, the judgment of the Justice of the Peace, in the words following:

"This day came the parties aforesaid, and the defendant saying nothing why judgment ought not to go against him, it is considered that the plaintiff have judgment against the defendant for principal and interest, thirty-two dollars 31 1-4 cents."—That Thompson had appealed from said judgment to said Circuit Court, and that Curtis, the appellee, at the March term of said Court, had moved to have the appeal dismissed, on the ground that the same had been granted by the Justice of the Peace against law, which motion of the appellee to dismiss was sustained, on the authority of the proviso to the 22d section of the act relating to Justices' Courts [1 vol. *Dig.*, p. 481,] which provides, "that no appeal shall be allowed in any case where the judgment shall have been rendered by default, or of non-suit, unless the Justice of the Peace shall first have refused to grant the party aggrieved a new trial, if the same be applied for within twenty days from the rendition of judgment." It not appear-

ing that any motion or application was made to the Justice for a new trial. It is contended that the judgment of the Justice is a judgment by default; strictly speaking, it is so. It is a judgment by *nil dicit*, which is one description of default. But the 12th section of the same act, [*Digest*, p. 476,] shows that the judgment by default contemplated in the statute, is one taken for want of appearance. In the case under consideration the record of the Justice shows that the defendant did appear, and it was not necessary, to entitle himself to an appeal, to move for a new trial, and the Circuit Court erred in dismissing the appeal; and it is adjudged that a peremptory mandamus go from this Court, commanding said Circuit Court to reinstate said appeal, and proceed to hear and determine the same according to law.

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(231) FOSTER & FOSTER v. WALLACE.

1. A creditor is a competent witness to increase a solvent estate of a deceased person. (Note *a*.)
2. The fact that A. was merely a security in a bond, may be proven by any witness who knows the fact, as well as by a subscribing witness to the bond itself.
3. Parol evidence will be admitted to establish the indebtedness of a fraudulent conveyancer, and it is not necessary to produce the bonds or promissory note, if such evidence of the debt be in existence.
4. The fact of continuing in possession of slaves after the sale, does per se constitute the sale fraudulent and void as to creditors. (Note *b*.)

APPEAL from Howard Circuit Court.

TOMPKINS, J., delivered the opinion of the Court.

Wallace sued the Fosters, appellants, as executors of Charles Simmons, in an action of debt on a bond made by Simmons on the 18th day of February, 1824, for a sum of money to be paid on the 1st day of May, 1826. The defendants pleaded 1st, *non est factum*; 2d, *ne unques executors*; and 3d, that Simmons died intestate, and that before the commencement of this suit, Robert Wash was, and ever since has been, and still is, Simmons' administrator. Upon the first and second pleas the plaintiff took issue, and to the third plea replied, that the defendants, after the death of Simmons, and before the grant of administration to Wash, took and converted to their own use certain personal property, being part of the estate of Simmons at the time of his death, and that they thereby became executors of their own wrong. Upon this replication issue was taken, and on these issues the cause was tried by a jury. Verdict, on all the issues, was found for the plaintiff, and judgment thereon rendered.

On the trial, it appeared that Simmons was domiciled and died intestate in Hardiman county, in the State of Tennessee, in August, 1824, and that administration of his effects was granted in that State on the third Monday in February, 1825, and afterwards, on 11th day of April, 1827, was granted to Robert Wash. The plaintiff rested his whole right of recovery upon the fact that the defendants had intermeddled with some slaves, the property of Simmons, and thereby had become executors of their own wrong. The slaves charged to be thus intermeddled with, were named John, Tom, Joe, Anthony, Mary, and Sal and her three children, viz: March, Ann and Martha.

To these slaves the defendants set up title in themselves, which title the plaintiff (232) insisted was fraudulent against Simmons' creditors. The plaintiff gave evidence that Simmons formerly resided in this State, and had the said slaves in his possession part of the time that he resided here; that in November, 1823, he removed to Hardiman county, in the State of Tennessee, and at the time of his death had all the slaves there in possession, except Joe; that after his death, and before any grant of letters of administration of his estate, the defendants went from this State to Simmons' late residence in Tennessee, and took the slaves into their possession, and brought them to this State, and claimed and used them as their own. The defendants gave evidence that the slaves Mary and Sal, and the issue of Sal, were and always had been the property of the defendant George, and that Simmons held them under a loan from the said George, who was the father-in-law of Simmons. It was also in evidence on the part of the defendants, that in the summer of the year 1823, the defendant, Josiah, purchased from Simmons two of the said slaves, viz: Tom and John, and that the two defendants purchased from him the slaves Joe and Anthony. Bills of sale for all were produced, except for Joe, and for him none had been given. The plaintiff gave evidence that when Simmons removed to Tennessee he took the said slaves with him; that at the time of the sale of said slaves he was greatly indebted; that Simmons continued in possession of the property after he had sold it; that Simmons had been five years in possession of the slaves Mary and Sal, and the issue of Sal, and that no writing declaring the loan of them to Simmons had been recorded. The defendants gave evidence controverting these facts, contending that the sales were in good faith, and for full and valuable consideration, and that the possession was not retained by Simmons, that he (S.) had at the time of the sales other property sufficient to satisfy all his debts.

On the trial, John Simmons, brother of the deceased, was offered as a witness by the plaintiff, who was objected to by the defendants, because the deceased having left no issue, the witness was interested in having the debts paid out of property which could not be reached by representatives of said deceased. For the purpose of showing the consideration given for the slaves Joe and Anthony, the defendants proved that Gaw's Ex'ors had recovered judgment against Simmons, and the defendant, Josiah, for $131, and that Josiah had satisfied this judgment; and then offered to prove that the said defendant had executed the writing merely as security of Simmons. This evidence the Court refused to allow unless the non-production of the subscribing witness to the writing was accounted for, and it was rejected. To prove that Simmons was indebted before the time of the several conveyances to the defendants, the plaintiff introduced J. Kingsbury to prove that before the date of these conveyances he held Simmons' bond for $200 or $300, and that on the 19th February, 1824, Simmons paid part of the debt, took up his bond, and together with another

person as security, executed to Kingsbury two other bonds for $50 each, the residue of the original debt, and that his security had, since Simmons' death, paid these two bonds. The plaintiff not accounting for the non-production of the bonds, the defendants objected to the testimony, but the objection was overruled and the testimony admitted.

The plaintiff also, for the same purpose, proved and read to the jury an obligation made by Simmons on the 16th day of February, 1824, payable to Peyton Nowlin, for $441 60, and produced said Nowlin as a witness to prove that W. F. Edwards, prior to the year 1823, held an obligation on Simmons, payable to himself, for a considerable sum of money; that after Edwards' death, this obligation came to the hands of Nowlin as administrator, and that in February, 1824, Nowlin delivered it up to Simmons, and received in lieu of it the aforesaid bond. This testimony was objected to for the same reason as that last before mentioned, but the objection was overruled. On the trial, the plaintiff, to show that the defendants held Simmons' bonds for the payment of large sums of money at the time of his death, introduced John Simmons, who testified that in November, 1824, he was in conversation with George S. Foster, at the late residence of Charles Simmons, in Tennessee, and that said Foster then read to the witness three notes from Charles Simmons, payable to the defendants, for $800 or $1000 each. The plaintiff then produced a copy of the record of a judgment of the Hardiman Court of Common Pleas and Quarter Sessions, in favor of George S. Foster, against the administrators of Charles Simmons, on a bond made by Simmons to Foster, dated 9th November, 1823, for $1000, and at the same time proved that the defendants had placed a transcript of the record of the judgment in the hands of an attorney, and authorized him to procure an allowance of the said claim in Howard County Court against R. Wash as administrator of Simmons, and that said attorney had made out a copy of said transcript and delivered it to Wash as notice of said (234) Foster's claim against Simmons' estate, and that the paper now produced was the copy which he delivered to Wash. The reading of the copy was objected to by the defendants, and the objection overruled by the Court.

The plaintiff then produced another writing, purporting to be a copy of the transcript of a record of a judgment of the same Court, in favor of Josiah Foster, against the administrators of the same, and for the same purpose as the former: the reading of which was in like manner objected to by the defendants, and the objection overruled. The plaintiff then produced the depositions of Robert Thrasher, H. C. Warren and William Ramsay. The deposition of Thrasher went to show that Simmons exercised the rights of ownership over the property contended for. Ramsay's was to the same purpose, as was the greater part of Warren's. Warren stated, that in conversation with Simmons, he had told him that it was understood that George S. Foster of Missouri held a lien on his property, and that Simmons replied it was a damned lie, that his property was his own, and no man had a lien on it. During the progress of the trial, the defendants, having previously given in evidence that Simmons' intention of removing to Tennessee was a matter of notoriety in the county long before his departure, the plaintiff produced a witness to prove that he met Simmons on his way to Tennessee, and that S. told him he was only going to the Potosi Mines, and meant to return. This testimony was objected to, but admitted by the Court. The Court instructed the jury:

First. If they find that the defendants intermeddled with the property of the deceased before the appointment of an administrator, then they should find for the plain-

tiff the sum due him from Simmons, although the property might not have been of the value of the debt.

Second. If they find that the defendants claimed the property by a conveyance under an absolute bill of sale from Simmons to them, and that the possession of the property did not accompany and follow said conveyance; and that the plaintiff was a creditor of Simmons at the time of such conveyance, and still is such creditor, that then such conveyance is void as against the plaintiff.

The defendants then moved the Court to instruct the jury:

First. That if the defendants' bills of sale were intended between the parties thereto only as a mortgage or indemnity to the defendants for money loaned or for securityships entered into, and such sales were in fact bona fide, such intention or agreement between the parties did not *per se* constitute such sale fradulent and void, as against Simmons' creditors.

(235) Second. That if Simmons died intestate, and after his death and before the commencement of this suit, administration of his estate was legally granted to R. Wash in this State, who ever since has been and still is administrator of such estate, that then the defendants are not chargeable as executors of their own wrong.

Third. That if the defendants had color of title to the property with which they intermeddled, they cannot be charged as executors of their own wrong.

Fourth. That if Simmons executed the bills of sale to the defendants to secure them for money loaned him by the defendants, and to secure them for their liability as security for Simmons, that then they cannot be charged as executors of their own wrong for taking such property.

Fifth. That if Simmons, at the time of his death, had his domicil in the State of Tennessee, and there died intestate, and administration of his estate was there granted in that State, which still remains in full force, and after such grant of administration the defendants took any of the property of Simmons in the State of Tennessee and brought it to the State of Missouri, that such taking and bringing away do not constitute them executors of their own wrong.

All which instructions were refused by the Court, and the following instructions were given:

First. That the declarations of Simmons made before or after the sale to the defendants, and which had been given in evidence, were good evidence to show the nature of Simmons' possession or claim to the property, but not to invalidate the title of the defendants.

Second. That if the defendants took the property under a fair claim of right, they are not chargeable as executors of their own wrong.

The defendants claim a reversal of the judgment for the following reasons, viz:

First. Because John Simmons was admitted as a competent witness for the plaintiff.

Second. Because H. C. Warren was admitted, &c.

Third. Because the defendants were not permitted to prove that Josiah Foster was merely security of Simmons in the bond to Gaw's executors, unless they produced or accounted for the non-production of the subscribing witness.

Fourth. Because parol evidence of Simmons' bond to Kingsbury was admitted in evidence.

Fifth. Because parol evidence of the two bonds made by S. and his security, was admitted, &c.

Sixth. Because parol evidence of the bond of S. to Wm. F. Edwards was admitted, &c.

(236) Seventh. Because the copy of the transcript of the record of the judgment of the Hardiman Court of Common Pleas and Quarter Sessions, between George S. Foster, plaintiff, and the administrators of Simmons, defendants, was admitted, &c.

Eighth. Because the copy of the trauscript of the record of the judgment of the Hardiman Court of Common Pleas and Quarter Sessions, between Josiah Foster, plaintiff, and the administrators of Charles Simmons, defendants, was admitted, &c.

Ninth. Because Thrasher's deposition was admitted, &c.

Tenth. Because Warren's deposition was admitted.

Eleventh. Because Ramsay's deposition was admitted, &c.

Twelfth. Because Donohoe's evidence of Simmons' declarations as to Simmons' intentions of going to the Mines was admitted, &c.

Thirteenth. Because the Court directed the jury that Simmons' retaining possession of the slaves after the sale, did *per se* constitute the sale fraudulent and void.

Fourteenth. Because the Court refused to instruct the jury, that the understanding or agreement between Simmons and the defendants, that the latter should hold the slaves sold to them only as a mortgage or indemnity to them, did not *per se* constitute the sales void as to creditors of Simmons, if such sales were in point of fact bona fide.

Fifteenth. Because the Court directed the jury, that if the defendants took possession of the property of Simmons after his death, and before any grant of letters of administration, and claimed and used it as their own, or sold or disposed of it as their own, they ought to find for the plaintiff on the plea of *ne unques executors*.

Sixteenth. Because the Court refused to instruct the jury, that if they found that Simmons was domiciled and died intestate in Tennessee, with the property then in his possession, and that administration was granted in Tennessee, and then the defendants took the property in Tennesse and brought it to this State, claiming it and using it as their own, they are not chargeable as executors of their own wrong.

First. John Simmons was the brother of Charles Simmons, the intestate. This point will be decided for the appellee, the Court being divided in opinion.

Second. H. C. Warren was a creditor, and it being assumed that Simmons, the intestate, was insolvent, it is contended that Warren was therefore an incompetent witness. The authorities cited go to show that a creditor is an incompetent witness (237) to increase the funds of a bankrupt. The condition of a creditor of an insolvent, appears to be somewhat different from that of a creditor of a bankrupt; a bankrupt is brought into that condition involuntarily, that is by the act of others, and the law then takes possession of his property for the benefit of his creditors. An insolvent becomes so voluntarily; but it is only assumed that Simmons' estate is insufficient to pay his debts; for any thing shown here there may be property enough to pay the debts of the deceased, and it is not a necessary consequence that the witness is either to gain or lose by the verdict here given. We are inclined to think that he is a competent witness.

Third. Josiah Foster should have been permitted to prove that he was security of Simmons in the bond to Gaw's executors, by any witness who knew the fact. Had the executors needed a witness to prove the execution of the bond on the trial of the cause, the subscribing witness should have been produced; but it is not probable

that the subscribing witness would know or be able to prove more readily than any other person, who was the principal or security in the note.

Fourth, fifth and sixth. In these cases we think no error is committed. The object here was to prove that Simmons was indebted. Had he been sued on the notes, they ought to have been produced, because it would have been necessary to set out the contents in the declaration in such manner that the debtor might plead the recovery in bar of any subsequent action for the same cause. But here it was not necessary to prove the contents of the bonds. It suffices to know that Simmons was indebted, and it is not material whether by bond or promissory note; nor is the precise amount at all material.

Seventh and eighth. We think no error was committed here. The object of the plaintiff in producing these two copies of the record being only to prove that the defendants claimed money of Simmons' administrator on a judgment of a Court of Record, it would have been sufficient for that purpose to have proved that the defendants admitted verbally that they claimed the several sums which appear by those copies to have been adjudged to them against Simmons' administrator. Much better then, certainly, was the copy of the transcript which they, by their agent, had delivered to the administrator in this State, as evidence of their demand. Had it been an incorrect copy, they might have corrected their own mistake by producing a correct copy or transcript of the record.

(238) Ninth, tenth and eleventh. The parts of Trasher's deposition excepted to, beginning with the words, "Mr. Simmons, before he started to this country," &c., and the other parts of his deposition subsequently excepted to, are irrelevant and ought to have been excluded.

The part of Warren's testimony given in answer to the second interrogatory, and objected to by defendants, relates to the description of property Simmons had in his possession while he lived in Tennessee. It goes to show that Simmons exercised rights of ownership over negroes of the same description of those claimed by the defendants, and is properly admitted, except the words "acknowledged so to me," contained in the answer to the said second interrogatory, which are irrelevant, and should have been excluded. The other words excluded from the same answer by the Circuit Court, are also objectionable, and were by that Court properly excluded. The rest of Warren's testimony should have been excluded.

All those parts of Ramsay's testimony objected to, and which relate to Simmons' declarations that the property was his own, and his offering to trade it, should have been excluded unless the privity of the Fosters had been proved. It is clearly improper evidence. These points, then, are ruled for the appellants.

Twelfth. The defendants had given evidence to prove that Simmons' departure from Missouri to Tennessee, was a matter of notoriety in the neighborhood, and Donohoe was introduced by the plaintiff to prove that he met S. on his way to Tennessee, and that he declared he was only going to the Mines in Washington county, and would return in the spring. The use of the testimony is not very obvious to the Court, but if it were proper for the defendants to prove the notoriety of his departure, certainly the plaintiff might rebut the evidence of the defendants, and if the evidence be immaterial, it does not belong to the defendant to complain of an abuse introduced by himself. This point is ruled against the appellants.

Thirteenth. The Court instructed the jury that the fact of Simmons' continuing in possession of the slaves after the sale, did *per se* constitute the sale fraudulent and

void *as to creditors*, and this is probably the point which was intended to be made. For it is believed that the deed has always been deemed good between the parties thereto, although the vendor may have retained possession after the sale. Authorities on this point are much opposed to each other. We are inclined to rule the point (239) for the appellee, inasmuch as the Legislature have manifested a disposition so to construe such sales, and we believe that by such decision less injury would result to the community.

Fourteenth. There is no evidence on which to found the instruction here required.

Fifteenth. We can see no reason why this point should be ruled for the appellant. It is then ruled for the appellee.

Sixteenth. It does not appear that there was any evidence tending to prove that the slaves were taken away after letters of administration granted. It is then thought useless for the Court to make any decision on it. The judgment of the Circuit Court is reversed, and the cause remanded for further proceedings in conformity with this opinion.

(*a.*) See Foster and Foster *v.* Nowlin, 4 Mo. R., 24.
(*b.*) Overruled in Shepherd *v.* Trigg, 7 " " 151.

CASES REPORTED.

CASES REPORTED.

END OF VOL. II.

Esc J. G.